FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 125

WAYNE HARSH, PETITIONER,

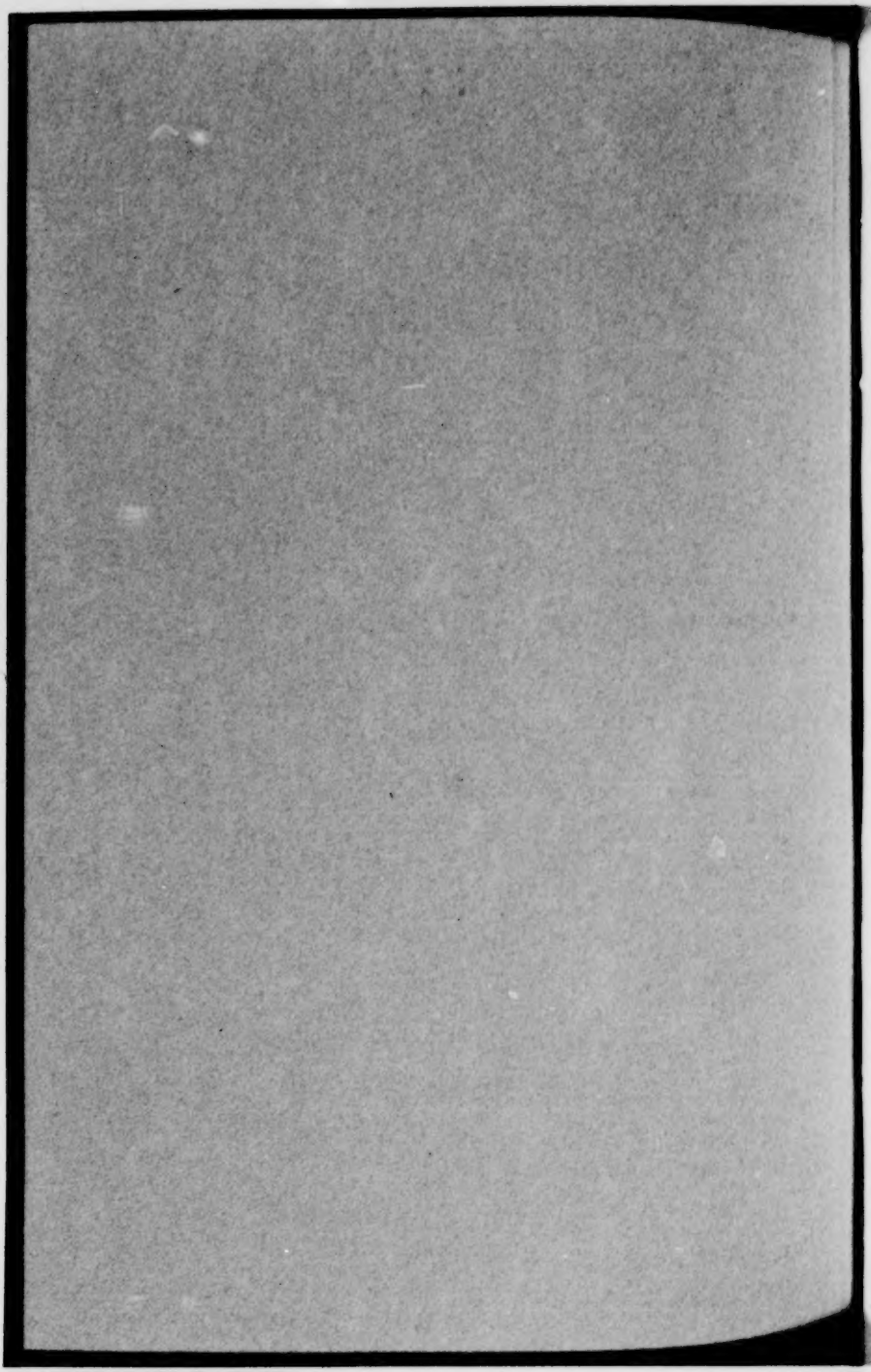
vs.

ILLINOIS TERMINAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JUNE 7, 1954

CERTIORARI GRANTED OCTOBER 18, 1954



BLEED THROUGH POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 125

WAYNE HARSH, PETITIONER,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of Illinois	a	1
Caption (omitted in printing)	a	
Petition for leave to appeal	1	1
Opinion, Bardens, J.	22	15
Supplement to opinion on denial of petition for rehearing, Bardens, J.	29	21
Abstract of record from Circuit Court of Madison County	39	22
Complaint	39	22
Answer	43	25
Notice of and motion for physical examination of plaintiff and denial thereof	44	25
Amended motion for physical examination of plaintiff	45	27
Verdict of jury (omitted in printing)	48	
Motion for court to determine and deny defendant's motion for directed verdict and to enter judgment on the verdict in favor of plaintiff (omitted in printing)	48	
Judgment on verdict of jury (omitted in printing)	51	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 15, 1954.

—8495

	Original	Print
Abstract of record from Circuit Court of Madison County—Continued		
Motion for judgment notwithstanding verdict and in the alternative for a new trial and denial thereof	51	28
Report of proceedings at trial	56	30
Testimony of Wayne Davis Harsh	56	30
Paul Kline	80	48
Paul Gages (omitted in printing)	86	
Dr. Leo Grzesk (omitted in printing)	90	
Raymond N. Philips	97	53
Harry Wydick (omitted in printing)	99	
Alpha Harsh (omitted in printing)	101	
J.A. Quigley (omitted in printing)	103	
Notation of order denying motion for directed verdict	104	54
Testimony of Dr. Wilbur K. Mueller (omitted in printing	104	
Dr. Joseph A. Lembeck (omitted in printing)	109	
Dr. Wm. F. Melick (omitted in printing)	113	
Dr. Edward C. Holscher (omitted in printing)	114	
Charles Elder	118	55
James Leroy Green	124	59
Cecil F. Campbell	130	62
John Quigley (recalled) (omitted in printing)	131	
Fred C. Barnhart	135	63
Raymond N. Phillips (recalled)	141	67
Wayne Harsh (recalled)	141	67
Motion for directed verdict	142	68
Abstract of record from Appellate Court, Fourth District (Excerpts)	148	68
Notation of appellee's motion to strike remanding order as being filed with proof of service and affidavits	150	68
Notation of order striking remanding order	150	68
Order denying petition for leave to appeal	154	69
Designation of parts of record to be printed (omitted in printing)		
Cross-designation of additional parts of record to be printed (omitted in printing)		
Order granting certiorari	155	69

BLEED THROUGH POOR COPY

[fol. a] [Caption omitted]

[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF ILLINOIS

March Term, A. D. 1954

WAYNE HARSH, Plaintiff-Appellee,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY, a Corporation, Defendant-Appellant

Petition for Leave to Appeal from the Appellate Court, Fourth District

There Heard on Appeal from the Circuit Court of Madison County

Honorable Quinten Spivey, Trial Judge

PETITION FOR LEAVE TO APPEAL—Filed December 29, 1953

Statement of Facts

Because this case comes to this Court, solely on a legal question, that is, does a reviewing court in an action under the Federal Employers' Liability Act or Federal Safety [fol. 2] Appliance Act, have the power to hold a jury verdict against the manifest weight of the evidence, there need be but scant reference to the facts.

Reference to the sequence of events leading to this petition will suffice.

Plaintiff, Wayne Harsh, brought suit against the defendant, Illinois Terminal Railroad Company, in the Circuit Court of Madison County, Illinois, for injuries received while in the employ of the latter company. His action, was based on a contention that defendant had furnished him with a defective retriever, in violation of the Federal Safety Appliance Act, a companion act to the Federal Employers' Liability Act.

The jury found in favor of plaintiff and awarded him a verdict of Twelve Thousand Dollars ($12,000.00), and the

trial Court after denying defendant's motions for new trial and for judgment notwithstanding the verdict entered judgment on the verdict in favor of plaintiff. Defendant appealed to the Appellate Court for the Fourth District.

The Appellate Court held, that plaintiff had made a jury question, but that the verdict of the jury was against the manifest weight of the evidence, and reversed and remanded the cause for a new trial.

On plaintiff's petition for rehearing, setting up the fact that the Appellate Court was without authority, under the governing Federal rules of law to hold the verdict against the manifest weight of evidence, the Appellate Court by [fol. 3] inference allowed the petition at the same time denying it.

For the Court, wrote an additional opinion specifically denying the petition and relied upon its "historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence," for so doing.

Plaintiff, then pursuant to Rule 75 (c) of this Court, struck the remanding clause of the Appellate Court's judgment, thus making it final, and now seeks leave to appeal from a such final judgment, again raising the question of the right of the Appellate Court, under the governing Federal authority, to hold plaintiff's verdict to be against the manifest weight of the evidence.

[fol. 4] Points, Authorities and Suggestions

In actions under the Federal Employers' Liability Act the right of the parties are governed by the construction of the Act given by the Courts of the United States and are not governed by local rules of law in the various states.

Bailey v. Central Vermont Ry., 319 U. S. 350, at 352;
Ellis v. Union Pacific Railroad, 329 U. S. 649, at 653;
Williams v. New York Central Railroad, 402 Ill. 494, 84 F. 2d 399, at 405;
Grosse v. Terminal R. Ass'n. of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022;

BLEED THROUGH POOR COPY

The Appellate Court Court had no authority under the Federal law governing this cause to hold a submissible case as against the manifest weight of the evidence.

Tennant v. Peoria & Perkin Union Ry. Co., 321 U. S. 29, at 35;
Ellis v. Union Pacific Ry., 329 U. S. 649, at 653;
Lavender v. Kurn, Trustee of San Francisco Ry. Co., etc., 327 U. S. 645, at 652;
Witherbee v. Elgin, Joliet & Eastern Ry. Co., (C. C. A. 7th C.), 191 Fed. 2d 302, at 308;
Stanczak v. Pa. Ry. Co., 174 Fed. 2d 43, at 47;
Stanford v. Pa. Ry. Co., 171 Fed. 2d 632, at 634;
Bolin v. Lehigh Valley Ry. Co., 167 Fed. 934;
Henwood Trustee of St. L. Southwestern Ry. Co v. Chaney, 156 Fed. 2d 392, at 398;
Boston & M. R. R. Co. v. Cabana, 148 Fed. 2d 150, at 153;
[fol. 5] Waddell v. Chicago E. I. Ry. Co., 142 Fed. (2d) 309, at 309;
Chapman v. Alton Ry. Co. (C. C. A. 7th Cir.), 117 Fed. 2d 669, at 672;
Grand Trunk Western Ry. Co. v. Heattie, 48 Fed. 2d 759, at 761;
Williams v. N. Y. C. R. R. Co., 84 N. E. 2d 399, at 405-406;
Nickell v. B. & O. Ry. Co., 106 N. E. 2d 738, at 741, 347 Ill. App. 202 (4th Dist. of Ill.);
Grosse v. Terminal R. R. Ass'n. of St. Louis (4th Dist. of Ill.), 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022.

Plaintiff's action being under the Federal Statute, was governed by the construction of the act by the Federal Court. Local rules of law are not controlling in suits instituted in state courts and must yield to Federal rulings.

The foregoing rule is I believe generally accepted and is backed by ample authority.

Just a few references to the holdings of the United States Supreme and Circuit Courts of Appeal and the Supreme and Appellate Courts of this state will amply corroborate this statement.

In Bailey v. Central Vermont Railway, 319 U. S. 350, the Court said at page 352:

> "Section 1 of the Act makes the carrier liable in damages for any injuries or death resulting in whole or part from the negligence of any of its officers, agents, or employees.
> [fol. 6] "The rights which the Act creates are Federal rights protected by Federal rather than local rules of law (Citing authorities)."

In Ellis v. Union Pacific Railroad, 329 U. S. 649 at page 653, the Court said, in regard to the standard of negligence liability in cases under the Act:

> "Whether those standards are satisfied is a Federal question, the rights created being Federal rights (Citing authorities)."

In Williams v. New York Central Railroad, 402 Ill. 494, 84 N. E. 2d 339 at 405, this Court notes that this rule of law is applicable and cites some of the United States Supreme Court cases, already noted.

In Grosse v. Terminal R. Ass'n. of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, the very Court which reversed the case at bar, that is, the Appellate Court for the 4th District, at page 1022 of the Northeastern Reporter recognized this rule and said:

> "Therefore, state courts are bound by the decisions of the Federal Courts in such actions." (Citing authority.)

I do not believe that there can be any dispute about the Federal Courts ruling on points of law being binding on the state courts, and of course, this court is cognizant, that the Supreme Court of the United States has the power by certiorari to review the final holdings of the state courts in cases of this type.

As has been noted, the Appellate Court in the case at bar held plaintiff had submitted a sufficient case for the jury, [fol. 7] but that the verdict was against the manifest weight of the evidence. In this latter portion of the holding, the authorities clearly indicate it was in error.

BLEED THROUGH POOR COPY

Supporting its authority to so hold, the Appellate Court cited the single case of Robertson v. Louisville N. R. Co., 327 Ill. App. 44, 63 N. E. 2d 608, a case which the same court had previously decided in 1945.

It is interesting to note, that this case has never been since cited on any point (excluding the reference made to it in the opinion in the case at bar) and in the opinion, no Federal authority is cited to sustain the right of the Court to set aside the verdict. In fact, the court there was guilty of the same error as here, because it overlooked and misinterpreted the Federal cases specifically denying the right to hold the verdict as being against the manifest weight of the evidence.

What is amusing about the Court's holding is, that except for its erroneous holding in the Robertson case (327 Ill. App. 44), supra, this very Court has passed upon two Federal Employer cases and followed the correct federal rule.

First in Grosse v. Terminal R. Ass'n. of St. L., 307 Ill. App. 414, 29 N. E. 2d 1018, at page 1022 of the Northeastern Reporter, the Court said:

> "*The federal courts have held that the fact that the verdict and judgment are against the weight of the evidence are not for the determination of an appellate court.*" (Citing authority.) (Emphasis ours.)

[fol. 8] Yet, this same court would come along in the present case and state, in denying plaintiff's petition for rehearing, that there is language in the authorities therein cited by plaintiff which support plaintiff's contention, but "none which removes the reviewing courts' historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence."

No one denies the appellate court the clear right afforded it by statute [Sub. para. 3 (b), section 216, Chapt. 110, Ill. Rev. Stat.]to set aside a verdict as being against the manifest weight of the evidence in cases governed by state law. However, the case at bar is governed by federal rules of law, and this the appellate court failed to comprehend.

As has been noted, this very appellate district court has approved the true federal rule applicable to this cause.

Again, in Nickell v. Baltimore & O. R. Co., 106 N. E. 2d 738, 347 App. 202, this same Court, which reversed the case at bar, with the writer of the opinion in the case at bar, concurring with another justice (one Justice dissenting), announced and followed the correct rule in this type of case, saying at page 741 of the Northeastern Reporter:

> "Under the circumstances, questions of contributory negligence of defendant Railroad Company were questions of fact for determination by the jury. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Tennant v. Peoria & P. U. R. R. Co., 321 U. S. 29, 64 [fol. 9] S. Ct. 409, 88 L. Ed. 520; Williams v. New York Central R. R. Co., 402 Ill. 494, 84 N. E. 2d 399. We cannot say under the facts before us that the verdict of the jury was not supported by the evidence and a directed verdict, under the facts in the record, would have been improper. Wilkerson v. McCarthy, supra; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. *Once an evidentiary basis has been established for the jury's verdict the Court is required to uphold such* ***conclusion, even though such Court might draw*** *contrary inferences or feel that another conclusion is more reasonable.*" (Emphasis ours.)

In denying plaintiff's petition for rehearing, the Appellate Court noted several cases cited by plaintiff in his petition, and stated that none of these cases specifically passed upon the question of the right of the Appellate Court to reverse on the question of manifest weight of the evidence, and that, thus, these cases could not be considered controlling.

It is true, the cases so noted do not specifically pass on this question, because it was not an issue specifically presented in those particular cases. What the Court did say, time and time again, in those cases, as will be hereinafter noted, was, that the Appellate Court's function in reviewing cases arising under the acts was limited to determining if there were sufficient probative facts to require submission to a jury of the issues; once this is determined, then the

BLEED THROUGH POOR COPY

Court has exhausted its function and it can in no way weigh the evidence, nor draw a different inference from that of the jury.

[fol. 10] Here, the Appellate Court held plaintiff had made a sufficient case to submit to the jury, and having done so, under the federal rule its appellate function was completed.

There are cases not only in this state (Grosse v. Terminal R. R. Ass'n of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, at 1022, previously cited) but also in the federal reports which have passed squarely upon the right of a reviewing court to hold a verdict under the Federal Employers' or Safety Appliance Acts as being against the manifest weight of the evidence.

All of these (I challenge defendant to cite one to the contrary) have consistently held that the Appellate Court has no such right.

In Henwood, Trustee of St. L. Southwestern Ry. Co. v. Chaney, 156 Fed. 2d 392, at 398, the Court said:

> "The appellant in its brief presents argument relating to *inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision.* Tennant, Adm'x, v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

In Grand Trunk & W. Ry. Co. v. Heatlie, 48 Fed. 2d 759, at 761, the Court said:

> "The contention that the verdicts are against the weight of the evidence cannot be considered as this court can go no further than determine whether there [fol. 11] is substantial evidence to support them."

In Chapman v. Alton Ry. Co., 117 Fed. 2d 669, the Circuit Court of Appeals, for this Circuit, the seventh, had occasion to pass on this precise question. At page 672 of its opinion the Court said:

> "By assignment of error the plaintiff urges reversal on the ground that the verdict of the jury was against the manifest weight of the evidence. The duty of this

court under this assignment is limited to ascertaining if there was any substantial evidence to support the jury's verdict. The credibility of the witnesses, the inferences to be drawn from proven facts, the weight to be accorded the various items of evidence were exclusively for the jury. The rule to be followed is too familiar to warrant extended discussion." (Citing authority).

As we have seen, the federal and state courts have unequivocally refused to permit an appellate court to interfere with a verdict on the contention that it was against the manifest weight of the evidence.

The Appellate Court for the Fourth District of Illinois, whether it wishes or not to be, is governed by this rule, and it erred grievously in setting aside the verdict in the instant case, on such grounds, in contravention of the governing law.

The following cases, while they do not pass specifically upon the question of interfering with a jury verdict, on the [fol. 12] basis of manifest evidence, because that point was not involved in the respective cases, do delineate the power of an appellate court in cases arising under the act.

As will be noted, and as has been already mentioned, this power is solely, to determine if there is sufficient evidence to warrant submission of the case to the jury. Once this has been determined favorably to plaintiff, the reviewing court has spent its power to interfere with the jury verdict.

If we will just keep in mind that plaintiff's suit is a Federal right, arising under Federal statute, brought in the state court solely because same is a permissible forum, but nevertheless governed by federal law rather than local, any confusion about the court's authority will be eliminated.

Actually in this situation the state court is sitting as a federal court trying a federal case, governed by federal law, and is likewise true of a reviewing state court. Much of the confusion which arises in the litigation of cases under the Employers' Act could be obviated if this simple formula were persistently kept in mind.

Following are just a few of the cases of the Supreme Court of the United States and of this court in which the true federal rule has been enunciated:

BLEED THROUGH POOR COPY

In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, at page 35, the Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take [fol. 13] the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. Ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., supra (318 U. S. 68, 87 L. Ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Again in Ellis v. Union Pacific Railroad, 329 U. S. 649, at page 653, the Court said:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted facts, are questions for the jury. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. Ed. [fol. 14] 520, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647; Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-

minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 U. S., p. 652, 90 L. Ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 34 L. Ed. 235, 241, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, 87 L. Ed. 610, 618, 63 S. Ct. 444, 143 A. L. R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned.

"Reversed."

In Lavender v. Kurn, Trustee of San Francisco Railroad Co. etc., 327 U. S. 645, at page 652, the Court said:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was [fol. 15] murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citing cases.) See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act.' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjuncture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of specu-

BLEED THROUGH POOR COPY

lation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. *And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*

[fol. 16] "The judgment of the Supreme Court of Missouri is reversed and the case is remanded for whatever further proceedings may be necessary not inconsistent with this opinion."

In Bolin v. Lehigh Valley Railroad Co., 167 Federal 2d 934, the Court said:

"Appellant objects that the verdict is based on speculation and conjecture. On that subject the Supreme Court has recently said in Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 740, 744, 90 L. Ed. 916: 'It is no answer to say that the jury's verdict involved speculation and conjecture. * * * Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.' In the case at bar there is no complete absence of probative facts. As we have already indicated, the record contains testimony from which the jury could reasonably have drawn the inference of a violation of the Boiler Inspection Act, and that the violation led to the accident. Even if we might have drawn other infer-

ences, we have no power to upset a verdict based on that evidence."

[fol. 17] In Williams v. New York Central Railroad, 84 N. E. 2d 399, 402 Ill. 494, the Supreme Court of Illinois, in quoting from the case of Tennant v. Peoria & Pekin Union Railroad Co., 321 U. S. 29, at page 405 of the Northwestern Reporter, said:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citations.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In Stanczak v. Pa. Ry. Co., 171 Fed. 2d 43, at 47, the Court said:

"There being evidence from which the jury may reasonably have inferred that Stanczak came to his death by one of the means suggested above and upon [fol. 18] which to base a finding that such means involved negligence on the part of appellant under the circumstances shown by the evidence, it is not within the function of this court to go back of the jury's verdict to consider other possible means not involving negligence on the part of appellant." (Citing authority.)

BLEED THROUGH POOR COPY

In Boston & M. R. R. Co. v. Cabana, 148 Fed. 2d 150 at 153, the Court said:

> "To recover under the Federal Employers' Liability Act the plaintiff must prove that the defendant was negligent and that such negligence was the proximate cause in whole or in part of the accident." (Citing authority.)

In Witherbee v. Elgin, Joliet & Eastern Ry. Co. (C. C. A. 7th Circuit), 191 Fed. 2d 302 at page 308, the Court said:

> "An appellate court may not reweigh the evidence and set aside the verdict because the judges would draw different inferences and conclusions than the jury drew, or because they think that another result would be more reasonable. Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. Ed 520. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916."

Again the Circuit Court of Appeals for the Seventh Circuit in Waddell v. Chicago & E. I. R. Co., 142 Fed. 2d 309 at page 309, said:

> [fol. 19] "Defendant makes a rather convincing argument that plaintiff's injuries were not the result of any negligence on its part. It is an argument, however, which could more appropriately be made to the trier of the facts. Any doubt heretofore existing as to the limited scope of our authority on review has been dispelled by recent decision of the Supreme Court. Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; Tennant v. Peoria & Pekin Ry. Co., 64 Ct. 409. *No good purpose could be served, therefore, in relating or discussing the testimony farther than to ascertain it plaintiff's charge of negligence is supported by any substantial evidence when considered in the light most favorable to plaintiff and together with all inferences which may be reasonably drawn therefrom.*" (Emphasis ours.)

In Stanford v. Pa. Ry. Co., 171 Fed. 2d 632 at 634, the Court said:

> "Thus there is presented the question of whether there was any evidence to support the jury's finding that defendant negligently moved the engine at a time when Stanford was attempting to put water into the tender. If there was any evidence which, together with all the reasonable inferences that might be drawn therefrom, supports plaintiff's case, the trial judge erred in substituting his conclusion for those of the jury, since the jury is the tribunal to decide that type of issue." (Citing authority.) "Only a complete absence of probative facts to support the conclusion reached would justify a court to substitute its conclusion for [fols. 20-21] those of the jury. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. This is so because the choice of conflicting versions of the way the accident happened, the decision as to which witness is telling the truth and the inferences to be drawn from uncontroverted as well as controverted facts are question for the jury. Once there is a reasonable basis for concluding that there was negligence which caused the injury, it is irrelevant that fair minded men might reach a different conclusion. Otherwise it would be an invasion of the jury's function for the trial judge to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 91 L. Ed. 572."

Many other cases are available, but the foregoing should suffice. The above should conclusively prove that the appellate court erred in its judgment in this case, and that leave to appeal should be allowed.

Prayer

For the above and foregoing reasons, your petitioner, Wayne Harsh, respectfully prays that this Honorable Court grant leave to him to appeal to this Honorable Court from said judgment entered in the above-entitled cause in the Appellate Court, Fourth District of the State of Illinois.

BLEED THROUGH POOR COPY

[fol. 22] IN THE SUPREME COURT OF ILLINOIS, March Term, A. D. 1954

WAYNE HARSH, Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY, a Corporation, Defendant

Petition for Leave to Appeal from the Appellate Court, Fourt District

There Heard on Appeal from Circuit Court of Madison County

Honorable Quinten Spivey, Trial Judge

PETITION FOR LEAVE TO APPEAL
OPINION OF THE APPELLATE COURT

Bardens, P. J.,

Plaintiff filed his complaint in the Circuit Court of Madison County alleging a violation by defendant of the Federal Boiler Inspection Act and personal injury resulting therefrom. Defendant's motions for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence were overruled and the jury returned a verdict in the sum of $12,000.00 upon which judgment was entered. Defendant's motions for judgment n. o. v. and for a new trial were likewise overruled and this appeal followed.

[fol. 23] Defendant operates an electric interurban line from Alton, Illinois, to St. Louis, Missouri. Trolley poles connect with an overhead power line in the normal fashion and are retracted automatically to a horizontal position on top of the car if the pole should slip off the power line. The mechanism by which the pole is thus retracted is called a "retriever" and its alleged failure to operate properly is the basis of plaintiff's action. The retriever is an intricate device composed of powerful springs that are wound and set as the trolley pole rope is pulled out to put the pole in contact with the power line. Then if contact with the power line is broken and the rope suddenly jerked by the trolley springing free, the retriever is activated and causes the

rope to be automatically and quickly rewound into the retriever, bringing the pole down to the tope of the car. A retriever is located at both ends of the trolley car to control the trolley pole at that end. To "set" a retriever requires a careful pulling of the trolley rope out of the retriever until the retriever springs are fully wound and a catch takes hold keeping the springs tightly wound. Any jerk of the line as the trolley is then allowed to ascend to make contact with the powerline, or a failure of the catch to hold the spring tension, will result in the line being quickly and powerfully rewound.

On April 25, 1950, plaintiff was the conductor on the first car of a three-car train pulling into the St. Louis depot two to four minutes late. As the cars crossed a switch, the rear trolley on plaintiff's car jumped the track and he climbed out to reset it. Plaintiff testified that he pulled out the rope in the usual fashion and set the retriever; then with the tension from the retriever springs off the rope, he permitted it to slide slowly through his hands to bring the pole into contact with the power line; that suddenly the retriever operated, jerking the plaintiff between the two cars, injuring his back.

Plaintiff alleges that the retriever was defective and that the defendant's failure to keep the said retriever in a safe condition for his use constituted a violation of the Federal Boiler Inspection Act (45 USCA, Sec. 23). This paragraph is part of the Safety Appliance and Equipment Act and reads as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said [fol. 24] locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

BLEED THROUGH POOR COPY

This paragraph has been frequently construed and clearly imposes an absolute liability on the railroad for injuries to employees proximately caused by defective equipment. The liability under Paragraph 23 is not based on negligence and the railroad will therefore not be excused by a showing of care on its part or contributory negligence on the employee's part. A continuing, absolute duty to maintain equipment in a safe condition puts the railroad in the position of an insurer for injuries falling in this category. Moore v. Chesapeake & Ohio R. R. Co., 291 U. S. 205; Williams v. N. Y. Central Ry. Co., 402 Ill. 494, 84 N. E. (2d) 399.

The defendant's several motions raise the legal sufficiency of the plaintiff's evidence, standing alone, of proof of violation of Section 23, of proof of defectiveness of the retriever in question proximately causing plaintiff's injuries, and the weight of said evidence when considered in the light of all the evidence. The evidence shows that a retriever in perfect condition retrieves with a jerk when the trolley pole becomes disengaged from the power line; that is its normal function. It is also clear that considerable care is required or the retriever may be caused to retrieve as the rope is played out to raise the pole to the line. Various witnesses, including plaintiff, testified that it happened frequently in the process of resetting trolley poles.

Plaintiff's evidence does not include any affirmative, specific evidence of a defect in the retriever in question. It does, however, negate any fault or mishandling of the retriever by plaintiff and, therefore, argues inferentially that plaintiff's testimony of the happening of the incident evidences a defect in the mechanism. In addition to plaintiff's own testimony, a Mechanical engineer testified on his behalf that in [fol. 25] his opinion a retriever which retrieved under the circumstances described by plaintiff was defective in certain specific details. In testing this evidence under the issues raised by defendant's motion for a directed verdict we are bound to consider it, and reasonable inferences leading therefrom, as true. This does not mean that in any case the existence of necessary evidentiary facts can be argued wholly by evidence of the occurrence of an event, or that a forceful presumption or inference of fact is a sufficient substitute for evidence of said fact. However, in the instant case, the issue of liability turns upon the existence of

a defect in a mechanism to which the parties did not have equal access. Plaintiff's evidence of the incident created an inference of such a defect. In our view, the burden was properly on defendant to refute this inference by producing the allegedly defective retriever in court or presenting specific evidence as to its operating condition at the time in question. This it did not do. In the absence of such specific rebuttal, plaintiff's evidence taken as true has sufficient probative force to require the issues to be submitted to a jury. Robson v. Pennsylvania R. Co., 337 Ill. App. 557, 86 N. E. (2d) 403.

Defendant further contends that the verdict of the jury finding a violation of the Boiler Inspection Act is contrary to the manifest weight of the evidence. In general, it may be said that plaintiff's evidence of injury resulting from the allegedly defective retriever was contradicted in many particulars, but these contradictions went to the point of plaintiff's credibility and were resolved by the jury in his favor. However, with respect to the existence of the alleged defect, certain undisputed facts were established by the evidence. Plaintiff himself testified that before the run back to Alton was started, he saw the motorman set the pole that plaintiff had left in the retrieved position under the hook on top of the car, and that he presumed the retriever was reset at that time. Further, on the cross-examination of the mechanical engineer who gave opinion evidence on plaintiff's behalf as to possible defects in the retriever which would cause it to retrieve unexpectedly, it was stated that these same defects would prevent the retriever from operating normally [fol. 26] at all. Yet the evidence shows that the retriever operated normally before and after the incident complained of. In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. The burden rested on plaintiff to show that on

BLEED THROUGH POOR COPY

this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record. It is, therefore, our conclusion from all the evidence that the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence. Robertson v. Louisville & N. R. Co., 327 Ill. App. 44, 63 N. E. (2nd) 608.

Since this matter must be remanded to the trial court for a new trial because the jury's finding of a violation of the Boiler Inspection Act is manifestly against the weight of the evidence, we need not discuss in full other grounds of defendant's contention that it is entitled to a new trial. As a guide on the retrial of this cause, however, we might say that defendant's argument that the trial court erred in permitting plaintiff's expert to testify on the ground that his testimony was based on an experiment is without merit. The expert's testimony concerning the operation and mechanism of a retriever based on his disassembling of another retriever was designed to inform the jury of the workings of this intricate mechanism and give foundation to his opinion evidence. On the basis of his knowledge gained from disassembling a retriever, he gave his opinion as to what defect might have caused the retriever in question to operate in the fashion described by plaintiff. The significance of this foundation evidence lay not in the physical facts described, but in the opinions and conclusions based thereon. Therefore, the evidence was not in the [fol. 27] nature of an experiment and the dissimilarity of conditions at the time of injury and at the time of the witness's disassembling of the retriever did not render his testimony incompetent.

Another error urged by defendant was that the trial court erred in denying defendant's motion praying for an order requiring plaintiff to submit himself for physical examination, as provided by Rule 25 of the Federal Rules. In order to sustain such motion, it must necessarily be concluded that a federal rule of practice extends to a case based on a federal statute arising in a State Court since the law

of Illinois denies such right of physical examination. C. R. I. & P. Ry. Co. v. Benson, 352 Ill. 195, 185 N. E. 244. Rule 1 of the Federal Rules of Civil Procedure limits the scope of said rules to "procedure in the district courts of the United States." The granting to State Courts of concurrent jurisdiction in F.E.L.A. cases does not require that a federal rule supplant the procedural law of a state. It must, therefore, be concluded under the rule enunciated by the Illinois Supreme Court that a plaintiff cannot be required to submit to a physical examination in a matter pending in our State Courts even though the matter arises under a federal statute.

[fol. 28] Finally, defendant urges that the giving of an instruction on behalf of defendant and the refusal to give an instruction on defendant's behalf constituted error. Defendant's offered instruction was:

> "The Court instructs the jury that the mere happening of the alleged occurrence raises no presumption of the violation of the section of the statute in question."

This type of instruction has often been criticized as misleading and confusing though it correctly states the law. West Chicago Ry. Co. v. Peters, 196 Ill. 298; Elmore v. Cummings, 321 Ill. App. 234, 52 N. E. (2d) 827. Its fault lies in the fact that a series of similar instructions could isolate every element of a plaintiff's case and conclude that, standing alone, that element could not support a recovery. Each such instruction would be correct; but a clearer and fairer presentation of the law for the jury lies in an affirmative statement of what a plaintiff is required to prove to recover. The trial court correctly refused such instruction. Nor do we find any error in the giving of plaintiff's instruction referring to "the defective condition, as aforesaid," of the retriever without setting forth specifically the alleged defect. The jury heard the instructions as a series and were capable of remembering that the "as aforesaid" referred to a prior allegation of defectiveness and not to an established or recited defect. We have previously stated that plaintiff was required to prove a defect in the retriever.

BLEED THROUGH POOR COPY

We see no necessity that such defect be described specifically in the complaint or an instruction.

For the reasons specified, the cause is reversed and remanded for a new trial.

Reversed and remanded for a new trial.

Scheineman and Culbertson concur.

[fol. 29] SUPPLEMENT TO OPINION ON DENIAL OF PETITION FOR REHEARING

Bardens, J.

On petition for rehearing plaintiff contests, for the first time, the power of a reviewing court to consider the weight of the evidence in F.E.L.A. cases and to reverse and remand a judgment as against the manifest weight of the evidence. It is contended that once such court determines that there is sufficient evidence in the record to support submitting the issues to a jury, it has exhausted its function with respect to weighing the judgment against the evidence. Numerous cases are cited and relied upon, principally, Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916; Ellis v. Union Pacific Railroad Co., 329 U. S., 649, 91 L. Ed. 572; Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, 88 L. Ed. 520; Williams v. New York Central Railroad, 402 Ill. 494, 84 NE 2d 399; Nickell v. B. & O. R. Co., 347 Ill. App. 202, 106 NE 2d 738. All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against the manifest weight of evidence.

Standing alone, language from these opinions appears to lend force to plaintiff's argument. However, considering each case in its entirety, it becomes apparent that they do not support plaintiff's position. In virtually all of them the reviewing court does in fact carefully detail and consider the evidence. Where it was felt the trial court or a reviewing court weighed conflicting evidence, or considered inferences as true which a jury had already rejected, the lower court's action in taking the case from the jury was disapproved.

The opinion of the court in the case at bar notes the fact

that the evidence of an incident occurring and injury therefrom was highly contradicted but that these issues relate to the credibility of witnesses and were decided by the jury in plaintiff's favor. Such finding, therefore, was not disturbed. On the issue of the existence of a defective appliance, this court did not weigh conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference. It considered only undisputed facts and circumstances. These facts were not susceptible of varying inferences but constituted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever.

[fols. 30-38] Plaintiff has cited no authority, and we find none, which removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence. The cases cited do illustrate the reluctance of the reviewing courts to disturb findings on issues that are based on credibility of witnesses. We find in these authorities, however, no such restrictive rule of law as urged by plaintiff.

Petition for rehearing denied.

Scheineman, J.J., and Culbertson, J., concur.

[fol. 39] In the Supreme Court of Illinois

[Title omitted]

Abstract of Record from Circuit Court of Madison County

Complaint—Filed January 15, 1951

Complaint

Count 1

1. That the defendant, Illinois Terminal Railroad Company, on the 25th day of April, 1950, was in possession and control of and was operating a general railroad system consisting of both steam, diesel, and interurban electric [fol. 40] trains in the State of Illinois and particularly in Madison County, Illinois.

2. That plaintiff was then and there an employee of defendant as a conductor on one of defendant's electric trains.

BLEED THROUGH POOR COPY

3. That on said day, plaintiff was engaged as such conductor on said train while same was being brought into the depot of defendant in St. Louis, Missouri, which train was then and there being used by the defendant in carrying passengers in interstate commerce between the states.

4. That in the movement of said train the defendant was engaged in interstate commerce and in assisting and working on same plaintiff was also engaged in interstate commerce.

5. That there was then and there in full force and effect a certain United States Statute, being U. S. C. A., Title 45, Sec. 23, which is as follows:

> 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests.—It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with [fol. 41] the provisions of Sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (Feb. 17, 1911, c. 103, paragraph 2, 36 Stat. 913; Mar. 4, 1915, c. 169, paragraph 1, 38 Stat. 1192; June 7, 1924, c. 355, paragraph 2, 43 Stat. 659.)

6. That defendant's electric powered cars were equipped with retrievers which were used for recoiling the trolley rope on said cars in the event that said trolley jumped from the wire during the operation of same.

7. That in the event said trolley should jump the line as aforesaid, said retriever would recoil said rope and draw the trolley of said car down and rewind part of said rope into said retriever, and it was then necessary in order to reset said trolley rope that the part of said rope wound into said retriever be pulled out manually from said retriever by an employee of defendant.

8. That it was then and there the duty of defendant by reason of the aforementioned statute to maintain and keep said retriever in a proper and safe condition and unlawful for it to do otherwise, as provided by said Section 23 of the United States Code Annotated, as aforesaid.

9. That notwithstanding this duty of defendant as aforesaid it wholly failed to do same and on the date in question it permitted said retriever on its electrically powered car in the train in question upon which plaintiff was then and there employed, to be in an unsafe and improper condition to operate in the service for which it was put and in such [fol. 42] a condition as to imperil life and limb.

10. That while proceeding into defendant's depot in St. Louis, Missouri, as aforesaid, the trolley on one of said electric powered cars jumped from the line and plaintiff, in the courses of his employment, and while attempting to place said trolley back on the wire was injured, in that, he was pulling the rope from the retriever on said car when it recoiled jerking plaintiff violently to and against said car; that said retriever should not have recoiled in this manner and would not have done so had it been operating properly; that when so properly operating the retriever recoils only when the trolley has jumped the line and should not do so while the rope is being pulled from it as plaintiff was doing.

11. That as a result of the foregoing plaintiff sustained serious and permanent injury to his back, and to the muscles, bones, ligaments and tissues therein. That he also sustained divers and numerous other injuries and that all of said injuries have and will in the future cause him great pain and suffering, that he has lost and will continue to lose large sums of money he otherwise would have earned had he not been so injured. That plaintiff has also been obliged and will in the future continue to incur large expense in physician and hospital and medical expense in attempting to be cured of said injuries. All to the damage of plaintiff in the sum of Thirty Thousand Dollars ($30,000.00).

Wherefore plaintiff prays judgment against defendant in the sum of Thirty Thousand Dollars ($30,000.00) and costs [fol. 43] of suit.

BLEED THROUGH POOR COPY

(Count II of the complaint was dismissed by plaintiff on September 19, 1951, before the selection of the jury and is not abstracted because it is not in issue in this cause.)

Order extending time to plead by defendant until February 29, 1951.

Answer filed.

ANSWER

1. Admits the allegations of Paragraph 1 thereof.
2. Admits the allegations of Paragraph 2 thereof.
3. Admits the allegations of Paragraph 3 thereof.
4. Admits the allegations of Paragraph 4 thereof.
5. Admits the existence of the Statute alleged, but denies any inference of said Complaint that Defendant has not at all times fully complied therewith.
6. Admits the allegations of Paragraph 6 thereof.
7. Admits the allegations of Paragraph 7 thereof.
8. Admits the allegations of Paragraph 8 thereof, but denies any inference that the Defendant, at any time, did not maintain said retriever in a proper and safe condition as provided in said Section 23 of the United States Code.
9. Denies each and every allegation of Paragraph 9 thereof.
10. Denies each and every allegation of Paragraph 10 thereof.
11. Denies each and every allegation of Paragraph 11 thereof.

[fol. 44] Wherefore, Defendant prays judgment against Plaintiff for costs of suit.

NOTICE OF AND MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF—September 13, 1951

You are hereby notified that the Defendant will appear before the Circuit Court of Madison County, Illinois, at the Court House in Edwardsville, Illinois, at the hour of 9:30 A. M. Monday, September 17, 1951 for the purpose of calling up Motion attached to this Notice and for the purpose of

securing an Order conforming with said Motion, at which time you may appear if you so desire.

Dated this 13th day of September, A.D. 1951.

1. That Plaintiff has filed his suit for personal injuries claiming damages to the extent of Thirty Thousand Dollars ($30,000) and has brought such action under the Federal Employees' Liability Act and by reason thereof subject to Federal Rules of Civil Procedure.

2. That under said rules where the physical condition of a party is in controversy the Court may order such party to submit to a physical examination.

3. That Defendant under said Rule moves that Plaintiff, Wayne Harsh, be required to submit himself to a physical [fol. 45] examination to be made by the following qualified physician namely:

Dr. E. C. Holscher, Room 517, 3720 Washington Avenue, St. Louis, Missouri.

and that the physical examination should include the back, and the muscles, bones, ligaments and tissues therein and a general physical examination pertaining to the alleged injuries contained in Paragraph II of Count I and Paragraph 10 of Count II.

4. That Defendant will agree to pay all transportation charges to the place of examination and loss of time sustained by said Plaintiff.

5. That said examination to be made by said doctor at said address on Monday, September 17, 1951, at the hour of 3:00 P.M. Central Daylight Saving Time.

Wherefore, Defendant moves that the Court enter an Order requiring the Plaintiff, Wayne Harsh, to submit to a physical examination as set forth in the above Motion and in accordance with said Rule.

Order Denying Motion, as Amended After Leave, for Physical Examination of Plaintiff.

BLEED THROUGH POOR COPY

AMENDED MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF

1. That Plaintiff has filed his suit for personal injuries claiming damages to the extent of Thirty Thousand Dollars ($30,000) and has brought such action under the Federal [fol. 46] Employees' Liability Act and by reason thereof subject to Federal Rules of Civil Procedure.

2. That under said rules where the physical condition of a party is in controversy the Court may order such party to submit to a physical examination.

3. That said plaintiff testified under oath at deposition given on the 8th day of March, 1951, that he had received serious and permanent injuries as a result of the alleged negligence of the defendant; that the only way the true physical condition of said plaintiff can be ascertained is by a medical and physical examination, that said defendant is unable to properly prepare its defense to that portion of plaintiff's demand which relates to the extent of his alleged injuries without such discovery; that defendant should as a matter of right, both under the appropriate Federal Rules of Practice and under the Statutes and Common Law of the State of Illinois be given the right to secure a physical examination of the plaintiff by proper order of this court.

4. That defendant under said Federal Rules of Civil Procedure and by virtue of the Statutory and Common Law of the State of Illinois, moves that plaintiff Wayne Harsh be required to submit himself to a physical examination to be made by the following qualified physician namely:

Dr. E. C. Holscher, Room 517, 3720 Washington Avenue, St. Louis, Missouri.

[fols. 47-50] and that the physical examination should include the back, and the muscles, bones, ligaments and tissues therein and a general physical examination pertaining to the alleged injuries contained in Paragraph 11 of Count I and Paragraph 10 of Count II. That this Motion is not made for the purpose of delay but for the purpose of obtaining justice and a fair trial for said defendant.

5. That defendant will agree to pay all transportation charges to *to* the place of examination and loss of time sustained by said plaintiff.

6. That said examination to be made by said doctor at

said address on Monday, September 17, 1951, at the hour of 3:00 P. M. Central Daylight Saving Time.

Wherefore, said defendant moves this court to enter an order requiring said plaintiff to submit himself, before trial, to a medical and physical examination of his said alleged physical injuries, subject to such terms and conditions as this court shall impose in its said order.

[fol. 51] MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL—Filed June 25, 1952

1. That Plaintiff has failed to prove each and every material allegation of his Complaint.

2. That Plaintiff has failed to prove that the particular [fol. 52] retriever complained thereof in Count I of said Complaint was defective or that if failed to operate in the manner for which it was constructed.

3. That Plaintiff has failed to prove that the Defendant has violated any of the provisions of Section 23 of Title 45, U.S.C.A., as alleged in Paragraph 5 of Count I of said Complaint.

4. That the Plaintiff failed to prove any defect in the retriever on Defendant's equipment which would constitute a violation of U. S. Code, Title 45, Section 23.

5. That there was no evidence to prove that the alleged injury was the direct and proximate result of any violation of U. S. Code, Title 45, Section 23.

Wherefore, Defendant prays that judgment *be* entered in its favor and against the Plaintiff in bar of further action and for costs of suit.

Or if this Honorable Court does not see fit to enter judgment in favor of the Defendant, notwithstanding the verdict, then said Defendant, in the alternative, moves this Court to set aside the verdict of said jury and to grant a new trial and for cause thereof, shows to the Court the following:

1. The verdict is against the law and the evidence in this case.

2. The verdict is against the manifest weight of the evidence.

BLEED THROUGH POOR COPY

3. The verdict is against the law applicable to such case. [fol. 53] 4. There is not sufficient, competent or proper evidence to support such verdict.

5. The damages fixed by such verdict are excessive and are not reasonably supported by competent evidence.

6. The verdict is the result of sympathy for the Plaintiff.

7. The Court erred in admitting improper and incompetent evidence over objection by the Defendant.

8. That the Plaintiff failed to prove any defect in the retriever on Defendant's equipment which would constitute a violation of U. S. Code, Title 45, Section 23.

9. That there was no competent evidence that the retriever on the car in question was not in proper condition and safe to operate in the service to which the same had been put so that same could be employed in the active service of Defendant without unnecessary peril to life or limb.

10. That there is no evidence to prove a violation of Section 23, Title 45 of the U. S. Code or any part thereof.

11. That there was no evidence to prove that the alleged injury was the direct and proximate result of any violation of Section 23, Title 45 of the U. S. Code. That the Court allowed the introduction of incompetent evidence which determined the ultimate issue to be decided and thereby invaded the province of the jury.

[fol. 54] 12. That the opinion of the alleged expert was based upon an experiment and was incompetent as evidence because the essential conditions of the experiment were not shown to be the same as those existing at the time of the occurrence in question.

13. That the opinion of the alleged expert was pure speculation and was not given in response to any hypothetical question.

14. The Court erred in giving improper instructions offered on behalf of the Plaintiff.

15. The Court erred in refusing to give certain instructions offered by the Defendant.

16. That this Court is without jurisdiction to enter judgment on the verdict of the jury, since the Trial Judge who heard the evidence in this case reserved his ruling upon the Defendant's Motion for Directed Verdict at the close of all the evidence in the case.

17. The Court erred in refusing Defendant's Motion, as amended, for physical examination of Plaintiff by physician as provided by Federal Law.

Proceedings had and entered of record as follows:

July 16, 1952—On this day the Court hears arguments of counsel on the motion of the defendant for judgment notwithstanding the verdict and also motion for a new trial filed by the defendant herein and the court not being fully advised takes the said motion under advisement.

[fol. 55] Docket Entry

September 26, 1952—On this day the Court now being fully advised of the premises denied the defendant's motion for judgment notwithstanding the verdict. And the Court also being fully advised in the premises defendant's motion in the alternative for a new trial and heretofore taken under advisement is denied.

[fol. 56] Report of Proceedings at Trial—Filed December 22, 1952

Plaintiff's Evidence

Wayne Davis Harsh

Direct Examination.

My residence is Lindell Avenue, Nameoki, and I am a conductor and bus operator for the Illinois Terminal Railroad Company. I was so employed by said company on April 25, 1950, as a conductor and started to work that morning at Alton at 6:50 A.M. On the particular trip we were operating Train No. 9, a three-car train, and on this train was Charley Elder, motorman, myself as conductor, and J. L. Green and Mr. Campbell as trailer conductors. I was on Car No. 123, the first car of the three-car train. We used the rear trolley poles on the front two cars. They slant back, with the car going one direction and the poles slanting the other direction and that is the normal operation of the car. All three cars were loaded with passengers. We went into the St. Louis Junction from Alton;

BLEED THROUGH POOR COPY

we had occasion to go into the tunnel and the open area into the station there. Train No. 9 is a limited train out of Alton at 7:00 o'clock and we were in St. Louis at 7:48, I believe at that time track No. 1. Train No. 9, consisting of three large cars, always went in on track 3 and on the opposite side of the platform; in other words, there are platforms on both sides of the main platform in the middle and tracks on both sides. The normal operation is for the head conductor to get out, line the switch for track 3, [fol. 57] proceed until your complete train is through the crossover—what we call the crossover or switch, and the rear conductor drops off and lines the switch to No. 1 track. He gets back on his train and we pull on into the station and unload. On that particular morning we were 2 to 4 minutes late—it was between 7:50 and 7:52 a.m. when he got all the way into the station. We pulled up to track No. 3, or the switch, and I got out and lined the switch and gave my motorman the sign to proceed and he came on and as he passed me I stepped over and we started to cross onto track 3, and the pole on the second car didn't take the crossover and Mr. Green got out and pulled the pole down and put it underneath the safety hook. This is a hook for the pole to stay in and when he put the hook in we proceeded and the the pole on my car jumped the track, that is, jumped the rail and I got out and went back to reset the pole. When I went back to reset the pole I was between the first and second car. Between the cars there is a draw-back to pull the two cars together. The retriever is not directly in the center; it is to the right of the middle of the car, oh, from 8 to 10 inches from the center. The retriever is about 5½ foot from the level of the ground. On this particular day in question I had occasion to attempt to reset the trolley on the pole. I have had experience with retrievers and have been employed by the Company since 1944 and during the several years that intervened since my employment I have had occasion to operate retrievers on numerous occasions and that was my duty every time I worked the train service, and I was familiar with the normal operation of retrievers. On this particular day I dropped off the car and I saw we only had the one pole up after [fol. 58] Mr. Green pulled it down and put it under the

hook, then the entire train was controlled by this one pole and we were going to proceed into the station with it. The pole ran off and I went back to set the pole and I pulled the retriever out. At this point, in order to pull the retriever out it would take plenty of force, they are something to pull out. It takes considerable amount of strength, sometimes it is impossible. In order to pull this retriever out I took hold of the rope, naturally to pull it down against the car and I started pulling as much as was necessary to rewind these springs to reset the retriever. When it is set it locks itself on the leash, you release the rope, and release your pressure until you know when it is set. The retriever will click and stop and it will wind itself up very slowly and easily. I let the rope back into the retriever because the pole was up and when I got the pole down to where I could set it on the wire, and for some reason it caught and rewound and when it did it yanked me in between the cars. Then it was just like someone hit me and I had a terrible pain all the way down my head and back and sickening. I tried to pull it out and I couldn't. I was sick and felt like vomiting, and I reached over the coupler with my other hand and set the other pole up and proceeded into the station. You have to set these retrievers very slowly because after you have used them you know what they will do. You know they will jerk your head off if you don't watch them. You have to work with them cautiously and slowly and carefully, but I was working slowly because I knew if I worked fast or any other way that it would retrieve. The rope was not at any time, while I was resetting it, played out in a sudden fashion. I did not reset it under the hook, [fol. 59] but I could not pull it out. It was pulled down to the car level, and in order to hook it in the hook you would have to pull it out and I couldn't pull it out. So it remained down on the top of the car and then I set the other trolley which was on the front. It was the front pole on the second car. When I reset the front pole on car No. 2, we backed in against the pole. That would be going in the wrong direction and you should not do it only in case of emergency. I did not observe what Mr. Green and Mr. Campbell were doing, they usually stand on the step of the car. I know a fellow by the name of Paul Gages who rides on my car and he was on the particular car at said

BLEED THROUGH POOR COPY

time. When I came back to get on the car, I pulled myself back on the step, there is a middle partition there and I took hold of it and pulled myself and went up, and when I turned around to give Mr. Elder the proceed sign, and observed Mr. Gages. The pain gradually started leaving, it was not nearly as severe as it was. When I reached the Station I did not discharge the passengers. It was customary for me to assist the passengers off the car. After that the train was dead-headed back into Granite City, but when the train stopped in the station and discharged passengers I saw Mr. Elder. He had just come out of the booth reporting to the dispatcher and he was heading what we term the lead car going out, it was the back car going in. Mr. Campbell's car, and as he came by I apprised Mr. Campbell and Mr. Elder of the injuries. When I got back into Granite City I went into the yard and terminated my employment for that period. I was due to work again later that day, I was off until about 2:10 p. m. that afternoon. I [fol. 60] worked from that time until about 6:15 p. m. When I got off the car I walked over to my car and then went to my home and my wife was there. I didn't eat any dinner or breakfast. When I got home I was too sick to eat any breakfast that my wife had already started to prepare and I went into my room, took my uniform off and laid down across the bed for a few minutes. After that I got up, went out to my car and drove to Wood River to see a Mr. Clyde Martin. Mr. Martin and I had engaged a roofing job to start that morning at 8:00 o'clock at Mr. DePaula's house. I started to Wood River, I was in considerable pain around my back and when I got to Wood River I parked my car in front of Mr. Phillips' house. Mr. Phillips is a co-worker with me, he is a motorman and a bus driver and his first name is Raymond. He works for the Illinois Terminal Railroad Company and still works for them. I went into Mr. Phillips' house and while I was there I called my wife at home. The purpose of calling my wife was to have her report out for me and that was about 9:30 and the reason I wanted to report off was because I was too sick to work. I stayed at Mr. Phillips' house for quite some time and I later saw him and Mr. Martin and he came there between 9:30 and 11:00. After Mr. Martin got there he consulted me and told me about the by-laws in the Alton

District and that was in regard to getting some waiver for the job. Mr. Martin went back into Mr. Phillips' house and called for the local to send a man. After that we went uptown about a quarter of twelve to get something to eat and I rode up there. I rode with Mr. Phillips in Mr. Martin's car and he parked about a block from the restaurant and they started walking off and they went out and left me and I hollered. I couldn't keep up with them because my [fol. 61] back was hurting too bad and my leg so that I couldn't hardly walk. The three of us went to the restaurant. I drank a cup of coffee and tried to eat a piece of pie, but I couldn't eat it. We went back to the car and went back to Del'aula's home and when we got there a Mr. Wydick had arrived there and was standing in front of the house with his tools. This was about 12:35. At that time that was the first time I went over to do work on the house. Before that time I hadn't done any work on the house. Mr. Martin and Mr. Wydick started to do some work on the roof top, but I didn't have anything to do with the roof. At that particular time my back was still hurting very much. At that time there was an incident about assisting with a ladder. Mr. Martin had one ladder up against the house, a section ladder, to take and make two ladders out of, and Mr. Wydick put the other ladder up, the rider jack on there and he was attempting to put a scaffold board upon the ladder and he had it practically up there, and I reached over and was going to move the ladder, try to pull it to me about six inches or so to make the ladder even, and when I did the jack and scaffold board from the ladder, the board, jack and everything fell, but it did not fall on me, and I was not injured as a result of that and did not have any pain or anything from that, and I did not fall, I just turned around against the house, the opposite house there. At that time I did not lift anything. After that I didn't continue to stay there, but I started for home and I presume it was about 1:00 and Mr. Martin had things lined up and I went over to Mr. Phillips' house. I walked with him a little while and he had telephoned and I didn't stay long. I went out in my [fol. 62] car and started home. I went home and I arrived about 2:00 o'clock, and when I arrived there my back was hurting. It seemed to hurt more and more all the time. That afternoon I went down to see Mr. Quigley, who is a dis-

BLEED THROUGH POOR COPY

patcher for us. I told him about this injury, I told him I had been hurt that morning and had to go to a doctor and I don't remember going into detail with it. I told him about getting hurt that morning. I told him the retriever had caught me and he gave me a slip for Missouri Pacific admitting me to a doctor and the slip did not designate any particular doctor. I went to Dr. Grzesk in Granite City, but I don't think he was a company doctor at that time. On a previous occasion on behalf of the Illinois Terminal I took a lady to Dr. Grzesk for medical attention. She got hurt on the interurban, a boy threw a rock through the window and it hit her, and I took her to Dr. Grzesk for treatment. That afternoon I went to Dr. Grzesk, who was a former associate of Dr. Darner. Dr. Darner was a company doctor. At that time Dr. Grzesk examined me, I discussed with him what the cause of my accident was. Dr. Grzesk put me on the table and examined my back, he had me under heat treatment for quite some time and I was in considerable pain and he also gave me a shot. He gave me a hypodermic. He didn't do anything else for me after he gave me the hypodermic, but I went home and went to bed. I didn't go back to work the following day, I returned to work the following Sunday. During the time I had left work and didn't return, I was in considerable pain all the time until they taped me up. The pain that I was speaking of was in the lower part of my back, down through the hip down the side of the leg to the knee and from the knee it [fol. 63] goes down the back of the leg down into the heel and the foot. The pain feels like needles in there all the time like your arm has been asleep, poor circulation, and it throbs and all that pain into my prostate and I was sick to my stomach all the time, I couldn't eat or keep anything down. The pain continued for a long time. I went down to the Illinois Terminal to make a report when I was able and I believe it was on Thursday, the 28th. About Plaintiff's Exhibit 1, that is my signature, Wayne D. Harsh. It was an accident report that I sent the Company.

(Plaintiff's Exhibit 1, the Accident Report, offered and received in evidence, and appears on pages 91-93 of the Record.)

I returned on the 28th, when I made this report. I made out two reports. I am not certain who I talked to at the

time, but if I talked to anybody it was Mr. Quigley. I had some further discussion with other employees of the company with reference to treatment for my injuries, a Mr. Dowd, who is head of the Claim Department, and he referred me to Dr. Royce, who is a physician in Granite City and a company physician, and I went to him. All that Dr. Royce did for me was to tape me up and I didn't see him any more, he didn't touch me, all he did was look at me. He had the nurse tape me up, high and real low, and he told me I could go back to work. That was the 28th, on a Friday. I sought some other medical attention from another company doctor; I was supposed to go back to Dr. Royce the following Monday morning, and I informed my foreman, Mr. Hurdle, that I would have to be off, and then I talked to Dr. Royce and told him that in order for me to [fol 64] get to see him in the morning that I would have to miss work and he told me not to miss work, that the company would relieve me to get off. I didn't go to see another doctor, I kept asking Mr. Hurdle to let me off and the said he couldn't, he said he didn't have anybody to relieve me, that he would make arrangements for Dr. Royce to see me after work, which he never did do. On the 18th I was too sick and I had to go to the Doctor, and I went to a Dr. Hand, a physician in Granite City. He was out of town the 18th, but I saw him on the 19th, and that was in May. Dr. Hand ordered me into the hospital the following morning, the Missouri Pacific Hospital, but I didn't go over there that morning, they wouldn't let me in. That is Mr. Hurdle. I didn't get into the hospital until 3 that afternoon and I was submitted to bed at 3:50 p.m. that afternoon. That was the hospital in St. Louis and I was admitted there as a service patient. I was signed in by a Mr. McOwen, General Superintendent of our division, and my admission to the hospital was based on a service injury, it was marked on my card service injury. I stayed there in the hospital until the 30th. But I didn't get any certain treatment. I was examined several times by the Missouri Pacific Association doctors and talked frequently and freely with them. I had been ordered to have what they call "whirl pool baths," but they never did give them to me. The only thing that was done for me there was to put me on a hard bed with boards underneath the mattress and I had to lay in bed all the

BLEED THROUGH POOR COPY

time, and all they would give me were shots or hypo pain pills. I stayed there until the 20th, when I was discharged, when they gave me a canvas belt to wear. I wore that on my back. I have continued to wear that belt and I have [fol. 65] been wearing it up until the present time. At times my pain was alleviated, sometimes no. Sometimes the pain was very severe and I was sick to my stomach and couldn't walk, and other days it would be in a way I would feel pretty good. I would be affected with pain if I would do anything, try to move things, and they warned me not to. I couldn't pick up my own little baby and play with him and I still have that condition up to the present time. From May 20th to 30th of May I was not paid any salary and did not receive any pay for that period. I was working seven days a week and earning $1.36 an hour and that was about $12.06 a day was the least we could make. But during the period from the 20th to the 30th I was off 10 days and never received any pay. From the date of the 25th till the time I went back to work I was off work and never received any pay, which was five or six days. After going to the hospital I continued to receive treatments from Dr. Grzesk and saw him at various intervals up to the present time, but he did not prescribe any particular treatment for me. He had given me medicine which I have taken all the time for the purpose of my nervousness and pain and I occasionally take those. I am still treating with Dr. Grzesk. I've been to see him periodically, oh, it runs from once a week to once every two weeks. In April of this year he ordered me to the hospital in Granite City for the purpose of taking X-rays and I was in the hospital all day. I lost six or seven days over that and I was not paid for it. My rate of pay is more now. It is $1.55½ on the buses now. I lost 8 hours and 20 minutes on the day and I would have been paid for the 20 minutes. In May, 1950, I lost work all the way through, there have been periodical spells I have not been able to [fol. 66] work. During November and December and October there were 12 days altogether. Our rate at that time was $1.55½ an hour. You worked 8 hours a day and you got overtime for all over 8 hours on the buses. Preceding the present time, during the spring and summer, I lost time, I couldn't give you the exact days, I could give you the days per month. It was 4 days in May and the last two months

I lost a day and a half. All the time that I was off was because I was unable to work. I worked seven days a week and when I wasn't working it was because I wasn't able to do it. I have had occasion to disassemble one of the retrievers and am familiar with the retrievers that are down there and I was familiar with the retriever on the particular car. I have had a chance to analyze a retriever of the same type that was on the car on this particular day. I took a retriever there from the company which is the same type used on the car. It was sitting on the o.k. bench, that is Bud Vassier's bench in the garage, or what we term the car barns. I took the retriever to the office of Mr. Chapman, my attorney. In the presence of my attorney and an engineer and a mechanic I examined the retriever in a garage in Granite City. It was the Plymouth and Dodge Garage in Granite City, and besides myself there was a Mr. Picker, who is the foreman, and a mechanic. The engineer's name is Kline; he is sitting back there in the court room in the second seat, but I can't remember his name. I was present there at the time that this retriever was taken apart and tested.

Q. Were you present there while it was being tested by this engineer?

Mr. Schuman: Just a minute—certainly that is objected to—it is not the retriever on this car.

[fol. 67] Mr. Chapman: We have to show it in order to make this proper.

Mr. Schuman: We object.

The Court: The retriever that the witness has been talking about, is that the retriever taken from this car?

Mr. Schuman: No, sir:

The Court: Then the objection will be sustained.

Mr. Chapman: This was the same type of retriever—we are going to show the mechanism of that retriever which was the same type.

The Court: The purpose of showing how it functioned?

Mr. Chapman: Yes, sir.

The Court: He may testify to that without this examination.

BLEED THROUGH POOR COPY

Mr. Chapman: I have to identify it as being the same type of retriever as being on this car.

The Court: He can testify how it functioned, but whether or not this retriever was out of repair wouldn't be material here.

Mr. Chapman: No—it is a matter of showing how it functioned.

Mr Burroughs: Another objection he should identify what type.

The Court: He testified to that.

Mr. Burroughs: He just has testified generally.

Mr. Chapman: You can cross-examine.

Mr. Burroughs: This is the first information we knew this had been taken from the shop.

The Court: You may cross-examine.

Mr. Chapman:

Q. Were you present at the time that retriever you testified about was disassembled?

A. Yes, sir.

[fol. 68] Q. And tested?

A. Yes, sir.

Q. You have already stated that you are familiar with the normal operation of the retriever?

A. Yes, sir.

Q. And when a retriever, Mr. Harsh, is played out in the manner you say you were setting at the time of this incident when you were injured, is the retriever operating normally or not?

Mr. Schuman: That is objected to as leading and suggestive.

The Court: I ruled this objection is sustained. I think if you want to show how they function, ask him how it functioned.

Mr. Burroughs: As an expert.

The Court: There was some testimony about this, its general operation—you have an expert here, an engineer who is familiar with retrievers, he may testify.

I have never had any previous trouble with my back whatsoever. About 11 years ago I fell across the hub keel

of a boat, I hurt my back, but it did not incapacitate me, I did not make a claim for it, and it cleared up in about 5 days. I had another incident when I was working for the company. I assisted a lady with some packages off the bus and a little boy had dropped his marble pack and I stepped on a marble and my foot went out from under me, and I went to a doctor and he used heat and salve and it was all over. That was when I was in the employ of the company. I don't think I lost any time. I might have lost a couple of days, but that was quite some time ago because there was no claim that arose out of it. I have not had any other injury to [fol. 69] my back since that incident that I remember. Before this injury I never had any trouble. I've always been able to work hard and lift a lot of weight. I was pretty proud of the fact that I was pretty physically fit.

Cross-examination.

Prior to the time that I worked for the Illinois Terminal Railroad Company, I worked on construction doing high work. I mean by that that I worked on buildings. I was a rigger or chipper. I worked out of Local 363, East St. Louis, as a boilermaker. I don't know just how long I followed that work. I also followed a riveter and was general foreman on construction work. Immediately preceding my employment with the Illinois Terminal Railroad Company, I did construction work and I worked at the Navy Yards at Charleston, South Carolina. While working there in South Carolina I got hurt on a boat about eleven years ago. It was during the war, about 1941, and I was there about 1943. I fell across the keel of a boat shortly after I went down there. I had been working at the ship yards in March, 1943 or 1944, and I worked construction work 8 or 9 months before I considered a job at the Illinois Terminal. Bob Meyers asked me to go to work. I was making $150.00 to $225.00 a week in construction work and it was seasonal work. I never worked for the Illinois Terminal before. I never had any training for it. I was broke in on the way around as a motorman, conductor and bus operator and I became familiar with the rules and regulations of the Company and had a general view of them. The only rule I was familiar with was the report we made on people who got

BLEED THROUGH POOR COPY

hurt, and I was not familiar with any rules pertaining to [fol. 70] myself or any injuries complained of by myself. When I was injured before on the occasion that I mentioned, I don't know whether I made a report or not. I fell on some marbles, I was given treatment by a company doctor, by an elderly gentleman over in Granite City. I spoke of the Missouri Pacific Hospital Association, I paid for that myself and I don't know whether the company paid part of that or not, but my part was deducted from my wages. The only expense over at the Missouri Pacific Hospital was $4.00 a month that was out of my salary. I went to the hospital as a service employee because I was sent there by a company doctor. I was not charged out of my insurance, it was charged out of the company, charged as a patient. I went there first in 1950, about a month after the accident, and had X-rays there, and I was X-rayed for my testicle, bladder and urine, knees, leg and feet, and I was given medicine. They didn't give me any kind of treatment for my back and I was not operated on. After I was in Missouri Pacific Hospital in May of 1950, I went back there several times, I don't remember what particular times. I went back because of my back. I went back quite a few times, but I don't know what days I went. I figured it up at one time and there was 34 doctors that examined me and couldn't find anything wrong with any part of my body or back. Dr. Lembeck examined me and a Dr. Holscher. I don't remember Dr. Mueller about X-rays. I remember Winkler and Burrow. I don't remember the last time I went back, all they would give me would be a sack of pills about that high, big round red pills, horse pills—and nerve pills and that is all. I took these pills but they didn't do me any good and I told them. I went back [fol. 71] to Dr. Grzesk in April, 1950, he was my family doctor and had been that before. I didn't go to him as a family doctor, I didn't go for him myself before, I went for my wife. I considered him my family doctor. This slip I got from Mr. Quigley permitted me to go to any doctor as far as I know and I could go to any doctor of my choosing. I paid for that service. After my injury I went back to the Missouri Pacific Hospital and had some teeth extracted. I was off a week or 7 or 9 days, I think. I am not

including this time as part of the lost time I testified to. I think it was in March, but I am not sure. I was not there recently. I was there in August of this year at the Missouri Pacific Hospital. I had a wrist injury in August of this year and I was at the Missouri Pacific Hospital in August of this year. I was there with my teeth in February 1951. August of this year, when I went in with my teeth, I complained about my back, but I don't know the doctor's name who I talked to. I was not given any treatment for my back at that time. At the time of my wrist injury in August, I was X-rayed at that time and I stayed 1 day. I lost 6 days and they won't pay me for it, 7 now, and I have made a claim for it. I was over there for my back injury in May of 1950 and I went back there for treatment of all kind, I mean one doctor would send me to another one, and another one, all the way down the line, I have been through the whole place. Outside of my back in May, 1950, I stayed there 10 days and they discharged me. They said I could get the same treatment at home and they discharged me. I didn't go back to work after I came back from the hospital. I went back to work on June 24, June of 1950, and I went on a bus and I had operated a bus before. Since I came back to [fol. 72] work, I had an increase in wages over what I made before. Since I went back to work, I have not operated the bus continuously. I had enough seniority so that I worked only an hour in the morning and an hour in the evening, actually about an hour and 40 minutes on duty, and I got a full pay for it and I had enough seniority to hold it. Outside of the times that I have testified, I have worked. I have been off periodically ever since I got hurt. I have no record actually of my time, because the record I had was destroyed by one of my children but I have gone out in the morning and worked a couple or 2 or 3 hours and would have to be relieved because I couldn't stand it because of the sickness and hurting and I would get sick to my stomach. Dr. Grzesk told me that the only thing I could do in time was to be operated on. I have never been operated on and don't want to be and everybody advises against it because there are too many people walking the streets or not living today who have gone. I work as much as I can work and make myself work. I have been operating this bus, and

BLEED THROUGH POOR COPY

the last two months I lost a day and a half apiece. I work periodically. I operate the bus, sit down and operate it, it only pains me at times, it doesn't pain me when I'm sitting if I'm sitting pretty quiet. Sometimes in normal operation of my work it pains me, it's all according to how I feel. It is paining me now, it is a sick pain. I worked for the Company since August 31, 1944. I have worked on the particular type of streetcar ever since I went to work, that would be from 1944 to 1950, and I became familiar with the type of retriever in that time. In the operation of the streetcar on numerous occasions I operated the retriever and oper- [fol. 73] ated the particular retriever on this streetcar on other occasions. I have had this situation happen to me on other occasions, on several occasions. I wouldn't give you a definite number of times, that is silly, I could give you an estimate, but it is silly to say it happened to me 10 times if I can't say it would be more than 10 times, but it would be a number of times, not to me only, but to everybody. During my daily run, the number of times that I would handle a retriever would depend on the run. The conductor changes trolleys at each end of the run. He pulls one down and puts the other one up, and during the course of the trip you may loose it once, may not loose it at all, and may loose it a half a dozen times. And on other occasions this thing has happened. I knew the normal operation of the retriever, and if you pull the rope out real quickly it would trip, it has happened to me that by pulling out the rope real fast that it trips on me. On occasions that this would happen, sometimes it would wind itself up and you start to reset it you are ducked away while you are pulling it. All of a sudden it will take you on in. It is supposed to work on a ratchet. This particular experience that I have had has happened on other streetcars besides car 123 and with other retrievers. I didn't operate this particular retriever on that car any other time than what I have testified about. We started the run in Alton. I was to just have one run that morning, I was working a split shift and we dead-headed back to Granite City and I was off at that time. My car was crowded when I left Granite City and there were other people on the car besides Mr. Gages.

I was not rejected for military service because of phy-

sical disability and I was not rejected. I was in Navy construction in the Navy Yard, my qualification as an ex-workman sent me there. The thing that happened on the par- [fol. 74] ticular morning in question happened on other occasions as we went into the station and it happened very often. I performed the same type of operation on the same type of retriever and streetcars on these other occasions that I did that morning. That happened quite frequently and was not anything unusual. What happened on that particular morning was that the trolley had followed the wire and the streetcar was going in another direction on track 3 and the trolley tripped. The retriever pulled itself down. I had to reset it but I didn't get the chance to reset it. That is the only time that pole had gone off that morning. When the pole was up and beyond the wire, that's what you call tripping the retriever, and the retriever had tripped and brought the pole down to the car —the pole had tripped itself—then the normal operation would be to set it to pull it up to the wire. I didn't set it. I couldn't. I pulled it out. I don't know what terms you'd have to use. I was pulling the pole up slowly when it slipped again and the pole came down the trolley. When it tripped it pulled me along and I held onto it. This was the same thing that has happened to me on other occasions. I had both hands on the rope and I was standing in between the cars and I don't remember whether I was on the rail or on the flat ground. I couldn't pull it back to reset it. I reached over the draw bar and took hold of the rope and pulled the other. That is the center bar. I had the doors opened on my streetcar and I got out on the right-hand side of the car. I had both doors open and didn't get all the way back on the car, I just got up where I could hold on and rode the car into the station, just a short distance. After the passengers were discharged Mr. Elder pulled out the trolley and [fol. 75] pulled it underneath the hook and when he pulled it out he evidently set it. It doesn't necessarily have to be set when you put it under the hook. I presume he did reset it. I saw him pull it out. I was standing at the side of the car in the middle, back from the middle toward the rear end. When I rode in with the passengers I stepped aside from the door and let the passengers go out, and I stood there all the time while they were unloading. I don't know

BLEED THROUGH POOR COPY

how long it took them to unload. We all got on the front car and rode it back to Granite City. I didn't say anything to the fellows in the streetcar about what occurred when we went back on the streetcar. When we got back to Granite City, I got out on Madison Avenue. I walked over toward the clubhouse and lined the switch, by that I mean that each train has a certain track to come in on in the yards. I am not certain but I think it was track 7 at that particular time, either 6 or 7, and we sent our cars in there. I had to throw a switch by lining it. That takes some physical exertion to do that. You have to pick up the device and turn it all the way over for those rails to go over and that's what I did. Then I went over and got in my car. I don't know if there was anybody in the barns that morning or not. I was not in the habit of going upstairs and I don't know. I didn't report to anybody after the run, but I was nauseated and sick, not so much then as I had been. The nausea and sickness had not left me from the time I discharged the passengers and gone over to the car barns. At the time it happened it made me terribly sick, it was all of a sudden. When I got back over to the car barns, I threw the switch and said nothing. I was out there by myself, conductors have duties to perform. I don't remember seeing any of [fol. 76] the other crewmen or talking to them after I got back to the yard. Generally I always took the car members up to Twenty-third Street, where they could catch their train, whether I did that morning or not, I don't know. I knew I was to meet somebody in Wood River and I had a contract with Mr. DePaula and I was to help Mr. Martin do that work. My first intentions were to help him do the work on the roof. I don't know how long I stayed up there, it was about half an hour. I got to my home around 8:30 and I drove my car up there by myself. The first one I saw in Wood River was some relation of Ray Phillips, they were working on the side of the house. I got home, I sat at home, and I was so sick that I didn't eat anything, I was afraid to, but as I drove along it didn't seem to bother me too much, sitting still, but when I started to get out of my car I couldn't hardly move. When I came back from the station across Madison Avenue and walked over to throw the switch and got in my car and came home I was not too nauseated at that time. I got to Wood River around 9:30.

Mr. Schuman: Q. You testified at a deposition, did you not, Mr. Harsh?

A. Yes, sir.

Q. That was taken in the presence of Mr. Chapman, is that right?

A. Yes, sir.

Q. On March 8, 1951, is that right?

A. I don't know.

Q. Well you did testify?

Mr. Chapman: We will agree it was.

Mr. Schuman: Q. Now, on page 31, was this question [fol. 77] asked you and did you make this answer:

"Q. Did you move any ladders on your own accord?

"A. I attempted to help the carpenter on the job move one."

The Witness: Yes, sir, I was telling you about that.

"Q. I thought awhile ago you said you were going to help Harry, the carpenter?

"A. I said I was going to attempt to move a ladder.

"Q. Is that correct?

"A. Yes, sir.

"Q. Did you make that statement?

"A. Yes, sir.

"Q. Did anybody move it while you were there?

"A. That particular ladder?

"Q. Yes.

"A. Harry moved his end of it.

"Q. How about the other end?

"A. It didn't move, it fell."

Q. Did you make those statements?

A. Yes, sir.

"Q. It fell without anyone being near it, is that right?

"A. I was going to pull the ladder down about a foot, there were two ladders leaning against the drain on the roof and we were going to scoot it down. I said: 'I'll see if I can help you,' and as I reached over to try to pull it, I couldn't pull it, he shoved his but mine wouldn't move, I couldn't move it."

BLEED THROUGH POOR COPY

[fol. 78] The Witness: A. I attempted to move the ladder, yes, sir, that is right.

Mr. Schuman: "While you were in the act of helping Harry, the ladder did fall down?"

"A. Yes, sir."

Q. Is that correct?

A. Yes, sir.

Mr. Chapman: What is impeaching about this?

The Court: Is this for impeachment purposes?

Mr. Schuman: Yes.

The Court: Now, isn't the law this that you can't impeach a person on anything not material?

Mr. Schuman: I think this was very material about the nature and extent of how he got this injury. He said he was trying to lift this ladder up here, your Honor.

The Witness: A. I did not.

The Court: I don't think you are making any progress, go ahead.

Mr. Schuman: Q. When you moved this ladder had this occurred before you made your phone call home or after?

A. After. You mean the ladder?

Q. Yes, sir.

A. Several hours later—not several, but a few hours, I said several, it is too many.

Q. I thought you said you called home around 9:30.

A. I called home between 9:30 and 10:00.

Q. Did you call home before you moved the ladder or after?

[fol. 79] A. I didn't move the ladder, Mr. Schuman.

All that is written on Plaintiff's Exhibit 1 is in my own handwriting. When I left Wood River I came down and went to Dr. Grzesk that afternoon after I got a slip from Mr. Quigley. With reference to the retriever that I got and took to Mr. Chapman's office, I just went down to the car barns and got it. I didn't request anybody to get it. I don't know whether anyone knew that I took it or not. Mr. Chapman asked me if I could borrow one. This particular retriever was not on any streetcar, but had been worked on. There was a rope in the retriever at the time but it was not on any particular streetcar. On the particular day in Wood River I did not go to the roof to help

at all on that particular day. After that I was upon the roof on the little end over the porch and that was since the incident occurred. I didn't do any other kind of physical manual labor besides driving buses after the injury. I did help drive some nails for Mr. Martin on his building and I assisted another Mr. Martin one evening and Bob and I helped him a little bit. I was upon the ladder but that was months after the injury and when I speak of Bob I mean Mr. Meyer. On the Meyers house that was a roof job I was up on Bob's house. At the present time I don't have much nausea, but it has not gotten progressively better. The pain and nausea is not continuous, if I do anything strenuous at all, it will bother me. I weigh about 190 pounds and it has not interfered with my weight, I started gaining weight in the last two months. I wouldn't say that it has gotten to feel better. I don't know whether I have less pain or more pain than I had before but I am still as nervous as I was and the reaction from the testicle is still the same. [fol. 80] I still have trouble with my testicle and I didn't have the nervousness before, and I didn't have the testicle condition before. It has interfered with my natural habits.

PAUL KLINE

Direct examination.

My name is Paul Klein and I am a mechanical engineer, a graduate from the Missouri School of Mines and Metal Work, Rolla, graduated in 1950. Since my graduation I have been employed in the engineering line at the American Steel Foundries in Granite City. I had occasion to examine a trolley retriever at the Dodge-Plymouth dealer in Granite City.

Mr. Schuman: That is objected to at this time for the further and additional reason that in the cross-examination of Mr. Harsh it has been shown that the retriever was taken without the permission of the company and with no permission of the company, and therefore was taken, we might say, almost stolen.

Mr. Chapman: It was returned to the company.

Mr. Schuman: Not as far as we know.

The Court: Overruled.

BLEED THROUGH POOR COPY

I had occasion in the presence of others to examine the trolley retriever on August 20 and I examined it one time later on September 16. I disassembled the retriever. I became familiar with the inner workings of it. The retriever has two coil springs—the upper portion has a coil spring and a coil spring in the lower portion, and the spring in the lower portion is inside a spool in which the core wraps around—going from the upper spring there is a paw mech- [fol. 81] anism in which this upper spring fastens on to it. In this paw mechanism there is several catches in which they interlock with several gears. There are three gears in this retriever, one on the inside of the upper portion of the retriever, one on the upper portion of the spool and one fits on top of the spring which is the upper portion also of the spool. As this retriever is on the main spring, the center spring, the lower portion spring is tightened up, there is a catch which catches onto this inner gear, and as this inner gear catches there is a mechanism which will take out this dog from the outer gear, and as this dog is kicked out of the outer gear the rope on this mechanism will come up on the tension of the upper spring. And that is the general operation of it. When you disengage the inner spring so that the rope is operating on the upper spring the rope is relatively free. There is a winding motion, a tension of the upper spring. During the course of my examination I had occasion to trip it and cause the retriever to operate. The way I did that was just if there is a severe pull on the rope, it will cause it to operate. On the actual retrieving movement what happens is that this spool or this bottom portion of the retriever will accelerate faster than the tension on the upper spring which will cause this dog to slip out of the gear and cause the retriever to retrieve. In the normal operation of the retriever the inner gear retriever mechanism will work only when there is a sudden jerking of the trolly pole. If the retriever were to retrieve on a normal or slow feeding or pulling out of the line it would not be working properly.

[fol. 82] Q. I say if the inner mechanism were to retrieve at the time the rope was being pulled out slowly without any jerking, would the retriever be operating properly or normally?

Mr. Schuman: We object.
The Court: Read the question.

(Question read by reporter as above recorded.)

Mr. Schuman: We object, he has not testified there was any such thing occurred in his experiment here about slowly pulling—it is calling for a conclusion.
The Court: I think you should lay the foundation of what he did.
Mr. Schuman: That is all he can testify.
Mr. Chapman: He is an expert.
Mr. Schuman: An expert on retrievers?
The Court: See if he did these things.

Q. I will ask you this question then—if the retriever were to operate while there was a normal slow pulling out of the line, if that inner mechanism were to retrieve, would the retriever be operating properly?
Mr. Schuman: That is objected to, he can only testify what he did and how it acted when it performed. Now *he* asking if it pulled slowly.
The Court: This particular retriever was the one he was asking about, the one he brought in there to check on.
Mr. Schuman: It was not on the streetcar—it was in the shop.
The Court: He can testify what the result was, what he did and limit it clearly to that.
[fol. 83] Mr. Chapman: What is your ruling on the question, you Honor?
The Court: Well, you were both talking, I don't know whether I got it.
Question read by reporter as follows:

Mr. Chapman: Q. I will ask you this question then. If the retriever were to operate while there was a normal slow pulling out of the line, if that inner mechanism were to retrieve, would the retriever be operating properly?
The Court: I think that calls for a conclusion of the witness. He can testify what he did and what the result was.
Mr. Chapman: For the purpose of the record plaintiff states that if this witness were permitted to answer this question that he would answer that the retriever were not properly operating.

BLEED THROUGH POOR COPY

The Court: Under what conditions?

Mr. Chapman: The conditions asked in the question.

Mr. Schuman: You just asked if certain things were done would that happen?

The Court: Just a minute. I understand if you are going to make an offer of proof you state the question you propose to have him answer and then tell what you want to prove.

Mr. Chapman: We have the question here, and you said it is not proper to answer. Now, all I have to prove in the record is if he were permitted to answer this question that he would answer that the retriever would not be properly operating under the circumstances assumed in the question.

The Court: Suppose you ask him what would be the result if the retriever were working properly with reference [fol. 84] to that matter. Restate your question.

Mr. Chapman: Q. Mr. Kline, in the course of a slow pulling out of the rope from the retriever after it has been wound and set, would the retriever normally, then, retrieve or not?

A. No.

Mr. Schuman: That is objected to, for the same reason, if your Honor please. He can testify what he did and what he observed there.

The Court: Objection overruled. Proceed.

Mr. Chapman: What is your answer?

Mr. Burroughs: That is further objected to——

The Court: Gentlemen, I think we have a rule here that where there is more than one attorney, that one attorney make the objections and not two. All right. Proceed.

The Witness: A. No.

Mr. Chapman: Q. Now, if the retriever, Mr. Kline, were to go into operation after it had been set on slow pulling out of the rope and retriever what, in your opinion, would be the cause of the defect, might or could cause that situation?

Mr. Schuman: That is objected to, for the same reason, asking for pure conclusion.

Mr. Chapman: I think not. He qualified as an expert and he examined it.

The Court: He may give his opinion as an expert.

A. "My opinion is that the paw mechanism would be some fault in the paw mechanism. There would be several reasons why it would cause it not to work properly. The main [fols. 85-96] reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning."

Q. And could there be a defect in one of those springs; is that what you are saying?

A. Yes, sir; there could be a defect in one of those springs, or it would slip out.

Cross-examination.

I am a mechanical engineer at the American Steel Foundry, and my title there is special engineer. I do all type of research work. On August 20, 1951, was the first time I had ever seen a retriever on a streetcar. At the time of the operation of the retriever, I used a rope and had it fastened in a vise. I couldn't pull it up or down. It would be a normal operation, but not in a normal position, the way I had it, as to the way it worked on a streetcar. I have never worked on a retriever on a streetcar, and the retriever I saw there was a Paul Warren.

Q. And were the springs broken?

A. No, sir.

Q. Now, if any of these things you call mechanical defects were in operation in this particular mechanism would it work normally and operate normally, if this particular thing you testified about, if the paw were worn and springs broken, would it work normally at all?

A. No, sir.

BLEED THROUGH POOR COPY

[fol. 97] RAYMOND N. PHILIPS

Direct examination.

I am a bus operator and motorman for the Illinois Terminal Railroad and I have been acquainted with the plaintiff, Wayne Harsh. I live at 423 Anna, Wood River. On the 25th of April, 1950, I had occasion to see Mr. Harsh at my residence and I first observed him in front of my house at the door. He went into my house and after he woke me up I invited him for a cup of coffee. I had a hand in getting him the job at the Martin's house. When Mr. Harsh arrived at my house that morning there was not a bit of work done at the house. I was with him during the time he arrived until noon or after, pretty near all the time. Fellow by the name of Wydick, the carpenter, arrived there some time in the afternoon, because we had a cup of coffee in the restaurant. When we went back to the house he was standing in the middle of the street. I observed Mr. Harsh and he was not nearly as active as he usually is and he complained about his back. He was fairly slow in the movement part as far as that goes. I saw him get out of the automobile, a slow movement. He didn't jump out of the automobile. When we got out of the car and went to the restaurant [fol. 98] he was behind us. He couldn't keep up with us as far as that goes. He was walking behind us. Before the time we saw Wydick there there was not any work done on the roof whatever. Mr. Harsh had not done any work at all. I went over to where the roofing job was done. I would say it was around 1 before they did anything on the roof. He made a call some time that morning to his wife and I am not sure about the time. I have had occasion in my work to work with retrievers and trolleys. I am familiar with the normal operation of them and I have had occasion to be holding on the rope on the trolley and have it retrieve. I weigh about 150 pounds. When you are holding on the rope, if you are not careful, it will carry you right in. I would just as soon let loose of that rope if I am not able to hold it. I am able to hold it if I put a stout grip on it; in other words, if I *break* myself.

Cross-examination.

I am friendly to Wayne Harsh as far as speaking goes. He came over to my house and I got out of bed and fixed the coffee. I did not, in the course of the morning, see Mr. Harsh on the roof of the house. There was no work done on the roof. I did not see him on the roof that afternoon. He was on the roof later on. He was just sitting up there. That was a couple of days in there. I am not sure which day it was. I have a way of fixing the date on which Mr. Harsh woke me up and later used the phone, because we had bought a sewing machine and we had to sign a contract on that particular day. It was around the 25th. I could look it up for you. I talked with Mr. Edrington of the Claim Department of the Illinois Terminal Railroad, and [fols. 99-103] when I told him the date I got the check stub that I wrote out for the down payment on the sewing machine. That is about the only thing I could go by, and I don't remember just what I done with that check. I actually don't remember. I am not good at remembering dates. I did not tell Mr. Edrington that I saw Mr. Harsh working on the house on the morning of April 24, 1950. I made a statement that he was on the roof. As far as the actual date, I don't believe I said the actual date. He was on the roof, but the exact date I don't remember. We finished the De Paula roofing job. I saw Mr. Harsh up on the roof one time. I don't recall how many times I seen Mr. Harsh on the roof. He was not working when I seen him. He was not doing any actual work, no labor or anything. When I saw him he was just sitting on the roof doing no work.

Redirect examination.

The exact date of this incident was the first work that they started to do actual work on the job.

Recross-examination.

I don't remember telling Mr. Edrington that I observed Mr. Harsh that day and from his general appearance I couldn't detect anything wrong with him.

[fols. 104-117] Thereupon the plaintiff rested his case. Motion for directed verdict at close of plaintiff's case.

BLEED THROUGH POOR COPY

denied by trial court, appears on page 210 of the record herein.

At the time that the defendant presented its motion for directed verdict, at the close of all the plaintiff's testimony, it was requested that the court allow the defendant to be heard and submit authorities on said Motion. The Court denied the request and over-ruled the Motion. To which ruling and action of the Court in denying said request and over ruling said Motion the defendant, by its counsel, then and there duly excepted.

DEFENDANT'S TESTIMONY

[fol. 118] CHARLES ELDER

Direct examination.

I live at Alton, Illinois. I am 68 years of age and a motorman and am employed with the Illinois Terminal Railroad for 21 years as a motorman. I have been engaged in the transportation branch, and on a run from Alton to St. Louis. I was the motorman on car 123 on the morning of April 25th. Mr. Harsh was conductor on that car, Mr. Greene was conductor on the second car and Mr. Campbell was conductor [fol. 119] on the third car. I recall the morning of April 25th, going into the tunnel at St. Louis Station. We arrived about 7:50, I was on the front train, there were three cars on the train and I was on the front part of the first car and that is car 123. The entrance doors on the particular car were near the center on both sides. The door which I get on is located on the right hand side, the right front. The cab is located on the front and to the right side. The controls where I was are on the right side, that means facing the direction in which the car moves. I remember the occasion when we went into the tunnel when the trolley didn't follow the right wire. As we went in on track 3, I knew the pole would continue on track 2, which it did, so I stopped and Harsh set it over on track 3, I pulled up and Campbell closed the switch. Then we broke off I would say a couple of hundred feet there is an overhead cross over where there is a "Y" and I think that is where the trolley came off the second time. When the trolley came off the second time Harsh went through the car and pulled it down and hooked

it down on the second car and I went on into the station. I was able to observe what Harsh was doing and I was able to observe where he put the poles. I knew that the back pole was up when I was pulling in there. I was able to see that because I had the cab door open and was standing in the door. To see him do that I would have to turn in the opposite direction. He got out of the train on my side. When he got out the second time he just went back as quick as he could and pulled the rope or retriever out. I don't know why he never told me why he hooked it down and put the other one up, it didn't make a bit of difference. He hooked the other one down, he put it on the hook. He put the trolley on the second car on the trolley wire. I don't [fol. 120] know whether he made any attempt from where I could see, to place the back trolley on the first car up on to the wire again when he went back there. It was done so quick, he was in there but a few seconds and right out again. After he laid the trolley on the second car he went on and got on the door and we pulled on in. I got off the front end, closed my door and called the train dispatcher. I came out of the phone booth, I observed the other trolley. I walked down and seen that was up, didn't have to put it up, and walked by the front car and I think Mr. Campbell put that up and we went back to Granite City, with the two poles up. The trolley that had been on the back end of car 123 going in was in the hook when I came out of the telephone booth. When we were going back to Granite City, car 123 was the tail car. It was a dead-head run. Members of the crew rode up at the front car on the trip back to Granite City. I had no conversation with Mr. Harsh on the way back, or at any time around the tunnel. He did not tell me at any time that he had been injured. With reference to Mr. Harsh's actions that I observed that morning on the way back to Granite City, I didn't notice anything out of the ordinary any more when we took the car back over there and put it in the yards. Mr. Harsh at that time, that morning, or since, did not ask me to file any report of his injury.

Defendant's Exhibits L and M, being photographs of the car, were marked for identification. The witness was handed Defendant's Exhibit L, and identified that as motor car

BLEED THROUGH POOR COPY

No. 123, and that was a photograph of the car that he was operating on April 25th, 1950. That there has been no [fol. 121] physical changes since April 25, 1950, and that picture correctly represents the position of the retriever on the car and the trolley pole and hook. There was no objection offered by plaintiff to the defendant's exhibit.

Defendant's Exhibit M was offered for identification purposes and identified as the same car, as 123 and 122, and the picture taken at the same time. This exhibit showed the two cars coupled together. Pictures show a retriever on the car and the same type of retriever that was on the car that morning.

Cross-examination.

I only know of one type of retriever and I have been with them about 20 years and that is the only type I ever saw. Cars 122 and 123 were hooked together on the morning like they show in the picture. I don't know what happened between those cars other than what I could see down the side. The center doors swing out and they don't block your view very much, they are not wide. They are out some distance. I could see over the tops of the doors. Harsh was back there, I think he pulled the retriever out. The business of pulling out the retriever would be to reset the pole. And he didn't reset the pole, no, sir, he hooked it on the hook and he set the pole on the second pole. It doesn't make any difference if you are backing against the pole. We run our cars in the subway like that down there. We don't run our main lines that way, we do in that subway, we back any way we want to. I recommend backing against the pole; we do that down there. I change the poles. The train end of the car was in the subway. It wouldn't make a bit of [fol. 122] difference about resetting the poles, he didn't have anything to explain or didn't tell me anything or I didn't ask him anything. When I testified in the deposition in 1951 I stated that the normal thing to do to avoid pulling in against the pole would have been to reset the rear pole on car 1 and that is what I would have done if I had been out there. That's what I would have done under normal circumstances. I said it didn't make any difference which way I pulled it. I have discussed this case with any-

body I wanted to. I didn't go about talking generally to people. I have never talked to Mr. O'Donnell about this case, I never heard of Mr. Edmunton. I know Mr. S. Edrington. I haven't been out in the hall talking to Mr. Edrington about the testimony, I talked to him when I got—I don't have to tell anything I talked about. I may have talked with Mr. Edrington about the case. He never discussed with me about what I was going to testify to. I was going to say the truth and that is all. They never asked me what I was going to say. I talked with Mr. Burroughs and Mr. Schuman about the case two or three times and I told them what I had seen, but I didn't discuss with them about what I was going to testify. I was talking about something else part of the time. The retriever has not jerked me in the course of resetting it and pulling it and I have set the retriever more than the conductors have.

Mr. Chapman: Were you asked this question in your deposition—page 18:

"Q. Now, you mentioned that you had had experience with the trolley retriever when you had already pulled the retriever out or pulled the rope out of the retriever for the purpose of resetting it, and then having it rewind on you. Has that happened during the course of your time?
[fol. 123] A. Yes, sir, they trip on you most any time."

The Witness: Yes, sir, they will trip on you.

Mr. Chapman: Well——

Mr. Schuman: Let him answer.

The Court: You are reading his answer from a deposition, confine it to that.

Mr. Chapman: I just asked him if he made that statement, he said he did.

The Court: All right, proceed.

Mr. Chapman: In fact, I think you mentioned it happened on you that very morning of the deposition, the morning the deposition was taken didn't you?

The Witness: Why, it is liable to happen on us any morning on any trip.

Mr. Chapman: All right. I think that is all.

Redirect examination.

What causes the retriever to trip is in case the trolley pole jumps off the wire to keep their pole down overhead. A jerk movement would cause the retriever to trip. Mr. Harsh took my deposition, that is right, and he inquired about all of the events of the occasion.

Mr. Chapman: We will stipulate to that.

Mr. Burroughs:

Q. Mr. Chapman just asked you whether this question was put to you: "Q. Wouldn't the normal thing to avoid pulling in against the pole have been to reset the rear pole on car one?" and your answer was: "A. That's what I would have done if I had been out there."

[fol. 124] Q. And didn't he then ask you:

"Q. That would have been the normal thing to do?" and didn't you tell him at that time it wouldn't make any difference.

A. I think I told him it wouldn't make any difference.

Mr. Burroughs: That is all.

Mr. Chapman: That is all.

JAMES LEROY GREEN

Direct examination.

I live at 2845 Iowa St., Granite City, Illinois, and am 28 years of age. My occupation is conductor for the Illinois Terminal Railroad Company for about 7½ years. I was a conductor on the train that went to St. Louis on the morning of April 25, 1950. Mr. Harsh was on that train in the capacity—well, he was on the head car, car 123. I don't remember the car I was on—I was on the second car; I recall going back to the Granite City Garage after the run to St. Louis. I rode on the front car with Mr. Campbell and Mr. Elder and Mr. Harsh. Mr. Harsh didn't make any complaint to me that morning about being injured. I didn't notice anything unusual about his general physical appearance. Mr. Harsh didn't ask me, at any time, to make out any report of an accident. He has not since that time asked me to make out the report of an accident. I am familiar

with the company rules in the operation of trains and in regard to reports of accidents for personal injuries.

Cross-examination.

I know what happened down in the subway and tunnel [fol. 125] regarding this trolley. The jumping of the pole on two occasions and on the first occasion Mr. Harsh reset the pole. I could have possibly have done it, too. I am a little hazy about that, it jumped the second time I was on car 2, I didn't get out of the car, I stood on the steps because we were coming in late, I might have stepped down on the ground. But I didn't move away from the door. I was in position to see Mr. Harsh go out to retrieve the trolley and reset it, and he pulled the retriever and he pulled it out and it seemed like it tripped again. He put the front trolley up on my car, but as I recall he still pulled the retriever out on it. I didn't say in my deposition that it was already set and it wouldn't be necessary to pull it out, because it would have to be pulled out, because it would be tripped. It could be put underneath without being tripped, but it wouldn't be safe, because you could pull it out from under the hook, as a matter of fact, it wouldn't stay under the hook.

Q. Can't the retriever or the trolley pole be hooked underneath the hook without the retriever being released?

A. It wouldn't stay under the hook because it will keep on pulling down until it stops.

Q. Will you answer my question—can't it be put——

A. Can it be put under the hook or can it be secured?

Q. I said, can't it be put under the hook?

A. It can be put under the hook.

Q. Let me ask you about your testimony taken about the time of the deposition in this case, page 41:

"A. Do you have to pull the retriever all the way out?

[fol. 126] "Q. The rope all the way out of the retriever?

"A. No, you can hook it down underneath it, but it will pull down hard enough for it to pull out of the hook, you see.

"Q. No, you can hook it down underneath it, but it will pull down hard enough for it to pull out of the hook"—is that what you said?

The Witness: Yes, sir.

BLEED THROUGH POOR COPY

Q. What would be pulling down?

A. You have a continuous pull down to pull down to unhook—that trolley wouldn't be resting on the hook at all, it would be down on the trolley stand——

When the retriever has been released of the pull on the rope, it is just the top spring it might wind in and out. But you told me it had not been released the second time. There was no necessity to pull the retriever out on the second car because the second trolley was already retrieved and the retriever released and that's all he had to do. All he had to do on the car that I was on was pull it out from under the hook. He didn't have to wind the retriever out. I have had occasions when those retrievers have tripped. They have quite a bit of tingle of the springs, I have had them pull me in before I could let go.

Direct examination.

Defendant's Exhibits L and M are cars 122 and 123 coupled together and the front end of car 123. I was present when those pictures were taken. Exhibit L is the front end and Exhibit M is the rear of car 123. Those pictures correctly represent the physical appearance of the ends of the cars as they appeared on April 25, 1950. The item on [fols. 127-129] the rear of the car in Exhibit L is the trolley rope and the retriever. And the button on the end of 123 is the trolley rope retriever.

Recross-examination.

There really isn't any front on these cars, they can be run in either direction, they are just as capable of running from one end as the other but we always consider the front the number one end, that is just an opinion because of the master switches being there. I weigh about 190 and within 10 or 15 pounds of that within the last year or two while working for the company. Defendant's Exhibit L was offered and received in evidence, objection was made to Defendant's Exhibit M and a rejection sustained (Record ——).

[fol. 130] CECIL CAMPBELL

Direct examination.

I live at 109 Thirteenth Street, Wood River, am 32 y[illegible] of age and a conductor on the Illinois Terminal Railroad and have been for five years. My last occupation was in the Navy, and that was from February 26 to July 20, 1951. I was a conductor on an Illinois Terminal Train on April 25, 1950, it was a morning run from Alton to St. Louis, I was operating on a split shift that day. Part of the run was in the morning and part in the afternoon. On that train was Mr. Elder, Mr. Harsh, Mr. Green and myself. Mr. Elder was the motorman, Mr. Harsh was on the front car as conductor, Mr. Green was in the middle car. I don't recall the number of the first car, I don't recall what car I was on. I recall an incident that occurred going into the station that morning when Mr. Harsh was conductor on the car. I recall the trip back to Granite City. I rode back on the car that I had and that was the motor car on the return trip. On the car with me were Mr. Elder, Mr. Harsh and Mr. Green. On the trip back to Granite City, Mr. Harsh did not make any statements about being hurt that morning on the retriever. He did not ask me at that time to make any personal injury report. His appearance that morning on the trip back from St. Louis to Granite City was the same as always. He did not appear to be in any pain. I did not notice any pained expression on his face. He has not, at any time since that morning, asked me to make any accident report with reference to any injury he may have received that morning.

[fols. 131-134] Cross-examination.

I don't remember the car I was on, I don't remember anything particular about that morning other than Mr. Elder made the statement when I got on the car with reference to the effect they had to back in against the pole. That was not the normal manner of doing it. I don't know that Harsh had hurt his back and had to use the pole on the other train. I go back and forth on that road every day and I sit with the same bunch of fellows every day that are on the trip. I can't tell you anything about the trip on April

BLEED THROUGH POOR COPY

30th, May 31st, or July 1st. I wasn't there July 1st. I was in the service in Japan on July 1st.

Redirect examination.

I remember about April 25th because of the fact of this trial, Mr. Harsh brought suit against the company. I don't know whether Mr. Harsh made the run on the afternoon of that day or not.

[fol. 135] FRED C. BARNHART

Direct examination.

I live at 206 West Hale, Edwardsville, Illinois, and am employed by the Illinois Terminal Railroad Company as [fol. 136] Shop Foreman at the Granite City Car Barns. My duties are supervision of work on all company equipment. I keep records on work that is done. There is a shop report made every day of the work done. In the daytime I make out these reports and at nighttime, Alton to St. Louis, the man that was on duty made them. As to the repair work done on car 123 with reference to the retriever, the retriever could be changed either at Granite City, St. Louis or Alton. We have shop reports from all these three places about any repair work done to retrievers and these are original records and I have them with me. Street cars have a regular inspection period, every 1200 miles. I mean by 1200 mile inspection period that the car is inspected, this inspection period we put up and check all the equipment of the car, we make adjustments, repairs that are not noticeable in the normal operation. If there are any repairs needed on a car while in service, there is a form of report made out, that is a written report. I have these reports with reference to car 123 and they cover a period from April 1, 1950, to May 15, 1950. At the time the incident occurred that is involved here, I was shop foreman in the same position on April 25, 1950, and those records were under my direct supervision and control. Some of these shop reports are sent from St. Louis to Granite City and I check them and turn them over to the Superintendent and they are the original reports in the man's own handwriting. These records are in the same condition as they were when

they were reported and sent to me and under my supervision. The block of paper referred to is on form 4446.

Q. Your form 89. You testified that those reports there [fol. 137] were made with reference to car 123, did you not?

A. Not all of these. That is the complete shop report there. They do take into consideration car 123. In examining these reports there was no repair work of any kind done on car 123 with reference to the retriever on either end of the street car. I also have another report form, 44-11 (old 253 called Inspection card) and these are the cards that I am speaking about on the 1200 mile inspection. These records show cards running through the period April 21, 1950, to May 4, 1950. On these inspection cards there is typewritten on the report "trolley and retriever." The report would not show repairs on retrievers, but it would show the car is o. k. at the completion of inspection. These reports, through the period of time testified, do not show that the retriever has ever been inspected as needing repair. To my knowledge, during the period of time that I have testified to, the retriever on car 123 has never been repaired in any way, shape or form. This was in respect to both retrievers. In inspecting these cars my shop men go out and bring them inside the shop, they are brought in under their own power. They put up a trolley pole and two men usually bring them in, the motorman and the switchman. At that time both retrievers are used in the operation, that is the front and back retriever. During the period that I have testified that the cars are inspected, the retrievers are used in the operation. The cars are inspected daily, once every 24 hours. This does not necessarily mean that it is run into the car barns, it may be on the road and finish the run in Alton, the Alton man will inspect that car. It may finish up in St. Louis and the St. Louis man will take care of it. The 1200 mile inspections on these cars are made [fol. 138] under my supervision in the Granite City shop. And these reports that pertain thereto are under my supervision. On April 25, 1950, we had a form 45 with reference to car 123. This form was produced. Defendant's Exhibit O was identified as form 45 and that is the form that is reported to me after a car has made its run. I received a report that morning on that particular car and received this

report from the club house fellow on car 123. The only thing shown in that report showed the standard pye stopped up on number 2 end. It does not show any defect with reference to either retriever on car 123. That is all that is shown on that report.

Cross-examination.

Q. Mr. Barnhart, do these all cover car 123 or is that all the cars?

A. That is all the cars.

Q. And where are your repair sheets on these cars?

A. These are the repair sheets. This is the work here that is performed and this is the form of Granite City shop between these hours.

Q. Do you have some entries here about repair of retriever?

A. The fact that these men change a retriever, they do not repair them, these men will not change retrievers.

Q. On the car number——

A. Yes, sir.

Q. Can you show me one of those on these reports——

Mr. Schuman: If there was a retriever through the period.

The Court: It is cross-examination.

Mr. Chapman: Q. Show me one of those.

[fol. 139] A. You would have to go through them.

Q. Show me one of those reports that show there was a retriever repaired.

A. You want me to go through all these?

Q. Yes, sir.

A. I'll sure have to do it, because I sure can't figure it out to you.

Q. Have you been through this (indicating)?

A. Why, sure, but I don't remember back to 1950.

Q. When were you through them?

A. I would say last week, and the only time I picked these out if you will note are repairs done to car 123.

Q. Well, will you find me one entry in there about a retriever?

A. I will if you will give me time to do it.

Mr. Schuman: Just a minute—this covers what period?

The Witness: It covers one day, it is one day, the 15th.

Mr. Chapman: Q. There is no retriever in that whole day?

A. No, sir.

Q. Didn't Mr. Vassier and some of these fellows at Granite City work on the retriever——

A. No, sir.

Q. Haven't you a fellow by the name of Vassier who works on retrievers?

A. Yes, sir.

Q. Isn't that this job?

A. Yes, sir.

Q. Then one of the men passes on this——

A. No, sir.

[fol. 140] Q. Isn't it true that in the course of your operation you have a whole group in there?

A. No, sir.

I would say that maybe we have one retriever in the barn a month. I would say there is only one retriever a month in the barns undergoing repairs. Mr. Vassier has many jobs as machinist and this is one of his minor duties about the retrievers. We do not have 5 or 6 retrievers on the bench in the barns being worked on. I would say that in the last four weeks there has not been a retriever repaired in that shop. These retrievers can be accommodated from time to time—these men move from one job in the shop to the other. We don't actually have as many as 5 or 6 or maybe 10 because we don't have that many extra. We have 5. Retriever repairs is never shown on my shop report. I have no report that shows it, I can't show it.

Redirect examination.

These inspection cards refer to the 1200-mile inspection. They cover the period of time from March 21, 1950, to May 4, 1950. During that period of time there were 5 1200-mile inspections made on car 123. Every time the car runs 1200 miles it would be inspected.

Recross-examination.

The form 45 that was turned in on car 123 on 4 25 50 was not made by Harsh.

Defendant rests.

BLEED THROUGH POOR COPY

[fol. 141] REBUTTAL

RAYMOND N. PHILLIPS

Direct examination.

I have already testified in this case. I worked on the streetcars for several years. I worked on them, off and on, about four years. I had occasions during that time to make some complaints about a retriever, and I have had something to do with turning a damaged rertiever in. The retriever is sent to the company for repair, and I don't know of any notations or data being given about when it comes off. I have never seen them make any.

Cross-examination.

Offhand, I couldn't tell you how many retrievers I have turned in in four years. If the rope would break over there, normally they would give you another one if they had one handy, and if they didn't they'd put a new rope in and rewind it for you. I never had to turn one in for bad order, because it don't do much good.

WAYNE HARSH

Direct examination.

I am the plaintiff in this case, and during the time that I have worked with the company, six or seven years, I have had occasion to have a retriever that was defective and needed to be turned in to the company. This occurred on several occasions. With regards to the retriever, as we approached the tunnel we give a blast of the whistle and the mechanics might hear. We go right by their tool room and just to the other side of that is the pit they put the trains over and work on them—when they are in bad order. They have a retriever there. If you ask for that retriever they take [fols. 142-147] this down, put another one on. I have never seen one tagged. I have taken them myself, on bad order equipment, back to Granite City, and they have no tags on and never anything put on but just bad order. Put them

in the place at Granite City, where they would be repaired, but there is no tag to identify what car they are off of.

Plaintiff rests.

No rebuttal for defendant, and defendant rests.

MOTION FOR DIRECT VERDICT

Defendant here tendered his written motion for directed verdict at the close of all the evidence (Record ——) as follows:

"Now comes the defendant, by its attorney, at the close of all the evidence in the case and moves the Court to give to the jury the following written instruction:

"The Court instructs the jury to return the following verdict:

"We the jury, find the defendant not guilty.

Illinois Terminal Railroad Company, by Burroughs, Simpson & Burroughs, Fred P. Schuman, Its Attorneys."

And the Trial Court reserved its decision thereon.

[fols. 148-149] ABSTRACT OF APPELLATE COURT RECORD

[fols. 150-153] 42. Notation, that on November 7th, 1953 appellee made a motion to strike pursuant to Rule 75c of The Civil Practice Act, the portion of the judgment of the Court remanding the cause for a new trial, and that same is taken under advisement.

43. Notice and proof of service of appellee's motion to strike the remanding portion of the judgment, filed November 7, 1953.

44. Motion of appellee to strike the remanding portion of the judgment, filed November 7, 1953.

45-46. Affidavit accompanying motion to strike remanding order.

47-48. Order dated November 19th, 1953, allowing appellee's motion to strike the remanding order, and text of order.

[fol. 154] In the Supreme Court of Illinois

Petition for Leave to Appeal from Appellate Court Fourth District, 7230, 53 F 12

Order Denying Petition for Leave to Appeal—March 10, 1954

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

[fol. 155] Supreme Court of the United States, October Term, 1954

No. 125

[Title omitted]

Order Allowing Certiorari—Filed October 14, 1954

The petition herein for a writ of ceriorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.